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THE LAW RELATING

TO

OIL AND GAS

INCLUDING

Oil and Gas Leases and Contracts, Production of Oil and Gas, both Natural and Artificial, and Supplying Heat and Light thereby, whether by Private Corporations or Municipalities, Regulating Gas Companies, Insurance, Negligence, Transportation, Explosives, Forms of Oil and Gas Leases and Contracts, etc.

With all Federal, State and Ontario Statutes pertaining to Natural Gas and Oil

THIRD EDITION

BY

W. W. THORNTON

Judge of the Superior Court of Marion County, Indiana

Volume II

CINCINNATI

THE W. H. ANDERSON CO.

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STREETS AND HIGHWAYS.

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§ 534. Definitions.—Street a highway.

The term "highway" is generic. It includes all public ways, and means a way which every person, whether an inhabitant or stranger, may use for passage or traffic. It includes streets in a city or town, turnpikes, plankroads, footways, sidewalks and bridges.[1] A public alley is as much a public highway as a public street. In usage the term street is applied to ways in a city or town, and is seldom applied to a

[1] Mobile and Ohio R. R. Co. v. Davis, 130 Ill. 146; 22 N. E. Rep. 850; State v. Wilkinson, 2 Vt. 480; Davis v. Smith, 130 Mass. 213; State v. Mathis, 21 Ind. 277; State v. Berdetta, 73 Ind. 185; 20 Am. Law Reg. 342; 38 Am. Rep. 117.

public way in the country.[2] But as has been aptly said, "Every street is a highway, but every highway is not a street."[3] A *cul de sac* may be a public highway, according to the later and better considered cases,[4] depending, however, on the facts in each instance.[5]

§ 535. Control of streets or highways.

Control of streets in a city or town is almost universally vested in the city or town;*[5] and it is an anomalous case where this is not true.[6] In the case of public country highways, control over them is usually vested in the county*[6] although there is some variance from this rule. The entire matter is usually the subject of statutory provisions; and such statutes must be considered in determining the power of a city, town or county over the streets or highways and the rights of a gas company therein.[7]

[2] A notable exception is the old Roman road in England, called "Watling Street."

[3] Indianapolis v. Croas, 7 Ind. 9, 12; Brace v. New York Central R. R. Co., 27 N. Y. 269; Heiple v. East Portland, 13 Ore. 97.

[4] Adams v. Harrington, 114 Ind. 66; 14 N. E. Rep. 603; Sheafe v. People, 87 Ill. 189; 29 Am. Rep. 49; People v. Kingman, 24 N. Y. 559.

[5] State v. Frazier, 28 Ind. 196; Bateman v. Bluck, 14 Eng. L. and Eq. 69.

*[5] Hughes v. Momence, 163 Ill. 535; 45 N. E. Rep. 300; State v. St. Louis, 145 Mo. 551; 46 S. W. Rep. 891; Sharp v. South Omaha, 53 Neb. 700; 74 N. W. Rep. 76; Coffeyville, etc., Co. v. Citizens', etc., Co., 55 Kan. 173; 40 Pac. Rep. 326; Mueller v. Egg Harbor City, 55 N. J. L. 245; 26 Atl. Rep. 89; Chicago, etc., Co. v. Lake, 130 Ill. 42; 22 N. E. Rep. 616; affirming 24 Ill. App. 346.

[6] Bennington v. Smith, 29 Vt. 254. See Philadelphia Co. v. Freeport, 167 Pa. St. 27; 31 Atl. Rep. 571.

*[6] Consumers' Gas Trust Co. v. Huntsinger, 12 Ind. App. 285; 40 N. E. Rep. 34; Board v. Indianapolis, 132 Ind. 27; 33 N. E. Rep. 972.

[7] A power in a municipality "to light the streets; to provide a supply of water for the use of the inhabitants," does not confer the right to pass an ordinance authorizing a gas company to lay mains in the streets to supply gas for domestic purposes. Ransberry v. Keller, 9 Pa. Co. Ct. Rep. 299.

As to power of Board of County Commissioners to grant right to lay pipes in villages of the county, see Consolidated Gas Co. v. Baltimore Co., 99 Md. 403; 58 Atl. Rep. 214.

Under the "general welfare" clause, a city cannot confer a fran-

§ 536. Use for private purposes.

Public highways and streets are for the use of the public, and not for private use. An individual in passing along them, is not devoting them in the strict sense of the term, to his own private use. "A grant of public street or highway through either town or country, cannot be considered otherwise than as a grant to the public. It confers no exclusive right; but *ex vi termini,* absolutely excludes the idea of private appropriation."*[7] The same court from which this quotation is made has declared that "public highways belong, from side to side and end to end, to the public;"[8] and this necessarily carries with it the corollary that no one can take a public highway for his own private use; for if he do, the public are excluded from it by his occupation of its surface. "A man has no right," was said in an old case, "to eke out the inconvenience of his own premises by taking the public highway into his timber yard."*[8] Thus it has been held that a fruit stand in a street is a nuisance *per se,*[9] and so are hayscales,*[9] a stairway,[10] a railroad.[11]

§ 537. Consent of municipality to occupy streets necessary.

Where a municipality has control over its streets and public ways, its consent to occupy such streets and ways with gas

chise for the owning and operating of waterworks, and for other things collateral thereto. National Foundry, etc., Works v. Oconto Water Co., 52 Fed. Rep. 29.

*[7] Conner v. New Albany, 1 Blackf. 43.

[8] State v. Berdetta, 73 Ind. 185; 20 Am. Law Reg. 342; 38 Am. Rep. 117.

*[8] King v. Jones, 3 Camp. 230; Rex v. Cross, 3 Camp. 224.

[9] State v. Berdetta, *supra.*

*[9] Emerson v. Babcock, 66 Ia. 257; 55 Am. Rep. 273.

[10] Pettis v. Johnson, 56 Ind. 139.

[11] Commonwealth v. Nashua, etc., R. R. Co., 2 Gray 54; Commonwealth v. Old Colony, etc., R. R. Co., 14 Gray 93; Schwede v. Hemrich Bros. Brewing Co. (Wash.), 69 Pac. Rep. 362.

The use of waterworks is a public one, if every inhabitant of the city along the pipe lines can obtain water if he desires it even though the city does not use the water in its public buildings or supply its hydrants. Smith v. Lincoln, 170 Mass. 488; 49 N. E. Rep. 640.

A city cannot authorize an individual to use a street for his own private use. Labry v. Gilmour, 121 Ky. 367; 89 S. W. Rep. 231; 28 Ky. L. Rep. 311.

pipes or mains must be obtained before a company can lay them therein. Any such occupation without such consent is illegal.[12] But the building of a plant for the manufacture of gas, and not for distribution is a very different thing, and permission from the city or town to build it is no more necessary than if it were any other kind of a manufacturing establishment. It cannot be said that the manufacture of gas is so dangerous as the manufacture of gunpowder or dynamite; and that its manufacture comes within the power of a municipality to prevent the manufacture and storage of dangerous and highly explosive materials within its boundaries. Although a city has no express power itself to lay pipes in its streets, yet under a general power or right to legislate fully in regard to lighting its streets, authority by implication is given it to direct by ordinance that gas pipes be laid in the streets for the purpose of lighting. In fact, it is said, a municipal corporation has the inherent power to lay gas-pipes in its streets for the benefit of its inhabitants.[13] A statute which authorizes corporations

[12] Carlisle Gas and Water Co. v. Carlisle Water Co., 182 Pa. St. 17; 37 Atl. Rep. 821; Appeal of City of Pittsburgh (Pa.), 7 Atl. Rep. 778; Chicago, etc., v. Lake, 130 Ill. 42; 22 N. E. Rep. 616; affirming 24 Ill. App. 346. Under the constitution of California (Art. 11, Sec. 19), a permit is not necessary. *In re* Johnston, 137 Cal. 115; 69 Pac. Rep. 973; New York v. Woodhaven Gaslight Co., 96 Misc. Rep. 52; 160 N. Y. Supp. 12; New York v. New York, etc., Co., 207 N. Y. 647; 100 N. E. 427, affirming 140 App. Div. 911; 125 N. Y. Supp. 1115; Cloverdale Homes v. Cloverdale, 182 Ala. 419; 62 So. 712; 47 L. R. A. (N. S.) 607; Ex parte Russell, 163 Cal. 668; 126 Pac. 875 (former rule in California now changed by amendment of Constitution Art. II, Sec. 19).

A city may require a gas company to pay for the privilege of using the streets, and such requirement is not open to the objection that it is a means to raise general revenue and thereby imposing an additional tax on the gas company not authorized by law. Columbus v. Columbus Gas Co., 76 Ohio St. 309; 81 N. E. Rep. 44.

[13] Strawbridge v. Philadelphia (Pa.), 13 Rep. 216; 13 Phila. 173. As to whether a gas plant is a dangerous agency, see Sec. 389 and the chapter on Nuisances.

As to what municipal body grants permission to occupy the streets of New York City, see Ghee v. Northern Union Gas Co., 158 N. Y. 510; 53 N. E. Rep. 692, reversing 34 N. Y. App. Div. 551; 56 N. Y. Supp. 450.

That a gas company must first obtain permission from a municipality to occupy its streets, see Missouri v. Murphy, 170 U. S. 78; 18 Sup. Ct. Rep. 505; Witeher v. Holland W. W. Co., 66 Hun 619; 20 N. Y. Supp. 560; Philadelphia Co.

to exercise all powers necessary to carry into effect the objects for which they are formed does not authorize a gas company, incorporated for a particular town, to lay its pipes in the streets of such town without the consent of the municipal authorities.[14]

v. Freeport, 167 Pa. St. 279; 31 Atl. Rep. 571; Carlisle Gas and Water Co. v. Carlisle Water Co., 182 Pa. St. 17; 37 Atl. Rep. 821.

[14] Chicago, etc., Co. v. Lake, 130 Ill. 42; 22 N. E. Rep. 616, affirming 24 Ill. App. 346.

A consent secured by bribery is invalid. Keogh v. Pittston, etc., Co., 5 Lack. Leg. N. 242.

An ordinance of a borough in Pennsylvania authorizing a gas company to lay its mains in the streets was held void, where the borough had no power to authorize the supplying of gas to its inhabitants. Ransberry v. Kellar, 9 Pa. Co. Ct. Rep. 299.

Under Pennsylvania statute, Act May 29, 1885 (P. L. 34, § 12), the courts settle disputes between natural gas companies and boroughs. Ft. Pitt Gas Co. v. Sewickley, 198 Pa. 201; 47 Atl. Rep. 957. Edgewood v. Scott, 29 Pa. Super. Ct. 156.

An ordinance granting a gas company the privilege of using the streets for laying pipes, which is passed in accordance with the requirements of a city charter, is valid. Morris v. Municipal Gas Co., 121 La. 1016; 46 So. 1001.

A statute empowering a municipality to grant the use of its streets to lay pipes and drains to supply heat and power, does not authorize the grant of a use to lay pipes to a company for the benefit of its own private use for an automatic package delivery, operated by compressed air. Ampt v. Cincinnati, 6 Ohio N. P. 401.

Where an ordinance requires a city to keep a map showing street lines, location of sewers and gas mains, it will be presumed that the map was kept; and the city is chargeable with knowledge of the location of a gas main in a street. Manuel v. Cumberland, 111 Md. 196; 73 Atl. Rep. 705.

An ordinance requiring a deposit of $10 for a permit to excavate in a street, $3 to be retained after the excavation had been filled, and $5 if the street is paved with asphalt, and that no excavation shall remain open over twenty-four hours, is unreasonable in the amount of the deposit. Ft. Pitt Gas Co. v. Sewickley, 30 Pittsb. Leg. J. (N. S.) 419, affirmed 198 Pa. 201; 47 Atl. Rep. 957.

The use must be a public one. Witcher v. Holland W. W. Co., 66 Hun 619; 20 N. Y. Supp. 560; Schwede v. Hemrich, etc., Co., 29 Wash. 21; 69 Pac. Rep. 362.

Where no question of an exclusive franchise is involved, or a municipality has no power to grant it, a company may be authorized to lay its pipes, in a street in which another company has its pipes, or the city may lay its own pipes there. Hughes v. Momence, 163 Ill. 535; 45 N. E. Rep. 300.

The borough Act of 1897 of New Jersey, providing that the borough council may prescribe the manner in which individuals or corporations may exercise any privilege granted them in the use of the street, only authorizes the regulation, not the

§ 538. Right to grant a franchise not property of municipality.

The right of a municipality to grant permission to a gas company to lay down pipes in its streets to supply gas is not a part of the municipality's property, to which the corporate

prohibition, of such privileges. An ordinance giving the street committee of the borough arbitrary power to refuse a permit to tear up the streets for the purpose of laying pipes therein is void. Madison v. Morristown, 63 N. J. Ch. 120; 52 Atl. Rep. 158; Hardman v. Cabot, 60 W. Va. 664; 55 S. E. Rep. 756; 7 L. R. A. (N. S.) 506.

A grant to lay pipes in the streets of a city has been held not to authorize the laying of pipes in a bare country road within such city without compensation to the abutting landowners. Richards v. Citizens' Water Supply Co. (N. Y.), 104 N. Y. Supp. Rep. 927.

The consent is valid, although no compensation be paid the city for it. La Harpe v. Elm Tp., etc., Co., 69 Kan. 97; 76 Pac. Rep. 448.

The right to use a public highway to lay gas pipes in may be granted to a *natural person.* Hardman v. Cabot, 60 W. Va. 664; 55 S. E. Rep. 756; 7 L. R. A. (N. S.) 506.

Under a power to enact ordinances for the government of a city not inconsistent with the laws of the State to secure order, health, quiet, and safety, a city cannot grant a gas franchise including the right to pipe streets for furnishing gas to customers. Elizabeth City v. Banks, 150 N. C. 407; 64 S. E. Rep. 189.

If a council has the power to confer a franchise on a gas company, by passing resolutions contemplating and providing for the execution of contracts with a gas company for lighting certain territory of the city, it gives the consent requisite to confer a franchise on the company. People v. Littleton, 185 N. Y. 605; 78 N. E. Rep. 1109; affirming 110 N. Y. App. Div. 728; 96 N. Y. Supp. 44.

If the statute does not specify in what manner the consent to occupy a highway shall be given, oral consent is a literal compliance with its terms; and it is sufficient even if given after the line is constructed. People v. Priest, 126 N. Y. Supp. 472.

A power to grant a privilege or franchise "by ordinance" in Tennessee cannot be made by a mere resolution; and if such a grant is made by ordinance, it cannot be amended by a resolution. Morristown v. East, etc., Co., 115 Fed. Rep. 304.

In Washington only the city council can make the grant, not the board of public works. Schwede v. Hemrich Bros., etc., Co., 29 Wash. 21; 69 Pac. Rep. 362.

Permission to lay its pipes in the streets of one municipality cannot be so stretched by a gas company as to enable it to lay them in another and distinct municipality. Madison v. Morristown Gaslight Co., 63 N. J. Eq. 120; 54 Atl. Rep. 439.

authority of such municipality is to revert for purposes of revenue. The municipality is not bound to sell such permission or treat it as a part of the municipal property which is to be used for the purposes of municipal revenue.[15]

§ 539. When consent of municipality not necessary.

Occasionally the charter of a gas or water company is so drafted by the legislature as to give the company the right to enter upon and lay its pipes or mains in the streets of the municipality for which it is chartered without the consent of the municipal authorities. Thus where the charter of a company expressly authorized it to lay its pipes under any highway or street of a particular city, it was held that the company need not first obtain the consent of the city before putting down its mains in the streets, and that a statute giving the board of public works of the city exclusive control over the use of all the streets of such city did not repeal that provision of the company's charter conferring upon it the right to so lay its pipes.[16]

Where a statute provided that a company might "lay its wires underground as the same may be necessary and in so many streets, squares, highways, lanes and public places as

[15] Smith v. Metropolitan Gaslight Co., 12 How. Pr. 187.

[16] Louisville v. Louisville Water Co., 105 Ky. 754; 49 L. S. Rep. 766; Atlanta v. Gate City Gaslight Co., 71 Ga. 106; La Harpe v. Elm Tp., etc., Co., 69 Kan. 97; 76 Pac. Rep. 448; Dorrance v. Bristol Borough, 224 Pa. 464; 73 Atl. Rep. 1015. See New York City v. N. Y. Mut. Gaslight Co. (N. Y.), 120 N. Y. Supp. Rep. 776.

A statute or the constitution may authorize a gas company to occupy the streets with the pipes without the consent of the city. Ex parte Russell, 163 Cal. 668; 126 Pac. 875; Vernon v. Los Angeles Gas & Electric Co., 19 Cal. App. 364; 125 Pac. 1084.

A statute requiring the consent of local authorities to extend its "mains" in a highway has no application to the laying of a two-inch pipe along side of a highway from its 15-inch main in such highway to supply a foundry, the pipe not being a "main." Whittington Gas, etc., Co. v. Chesterfield Gas & Water Board, 83 L. J. Ch. 662; [1914] 2 Ch. 146; 111 L. T. 422; 78 J. P. 379; 12 L. G. R. 892; 58 Sol. J. 577; 30 T. L. R. 519, affirming 83 L. J. Ch. 390; [1914] 1 Ch. 270.

may be deemed necessary for the purpose of supplying electricity and gas for light, power and heating, the whole however without doing any unnecessary damage and providing all proper facilities for free passage through the said streets, squares, highways, lanes and public places while the works are in progress," it was held that the power to break the surface of the streets, and to excavate them for the purpose stated in the statute was such a right as would be protected by injunction, to restrain the municipality from interfering with its laying the pipes in the streets.[17] A statute gave extensive powers to electric lighting companies, conferring upon them the right to use the streets, avenues, highways and alleys in the State for the purpose of erecting poles to sustain necessary wires, with the proviso that no poles should be erected in any street of any incorporated "city or town" without first obtaining from such incorporated "city or town" a designation of the streets in which it desired to place such poles, and the manner of placing the same. It was held that an electric

[17] Montreal v. Standard Light and Power Co. [1897], App. Cas. 527; 66 L. J. P. C. 113; 77 L. T. 115; Hill v. Wallasey L. B. [1894], 1 Ch. 133; 63 L. J. Ch. 1; 69 L. T. 641; 42 W. R. 81; 7 Rep. 51.

In England where the Public Health Act of 1875 vests in urban authority only such property in the soil of the street as is necessary for the control, protection, and maintenance of the street as a highway for public use, it confers upon them no authority to make excavations in the soil below the surface for the purpose of public convenience (Tunbridge Wells Corporation v. Baird [1896], App. Cas. 434; 65 L. J. Q. B. 451; 74 L. T. 385; 60 J. P. 788); and it was held that an electric lighting company, which had illegally broken up the surface of a street within a vestry district and placed its pipes and wires two feet below the surface, would not be compelled, at the suit of the vestry, to remove such pipes and wires, there being no continuing trespass upon or interference with any right of the vestry; for such vestry did not own the soil at the depth where the pipes and wires lay. Vestry of St. Mary v. County, etc., Co. [1899], 1 Ch. 474; 68 L. J. Ch. 238; 80 L. T. 31; 15 T. L. Rep. 175.

For a case where a statute authorized a gas company to cross a public highway without first securing authority so to do from local authority, although not to lay its pipes along such highways, see Consumers' Gas Trust Co. v. Huntsinger, 12 Ind. App. 285; 40 N. E. Rep. 34.

A right given to lay pipes in a street gives authority to lay lateral as well as main pipes, and to place gas boxes in such street. District of Columbia v. Washington Gaslight Co. 20 D. C. 39.

company could place its poles in the highway of a township without leave of the county or township authorities, the words "city or town" not including such territories of the State.[18] A statute authorized a company to lay its conductors and mains under all the streets of the City of New York, in consideration of a reduction by the company of the price of gas. A subsequent statute repealed this statute, but provided that the repeal should "not effect or impair any act done, or right accruing, accrued, or acquired" under the repealed act, and that "the same may be asserted and enforced as fully and to the same extent as if such law had not been repealed." It was held that such company was not deprived of its right to lay new mains necessary to complete unfinished work, and to make connections between the mains previously laid by it.[19]

§ 540. Nature of a grant to occupy streets or highways.— A mere privilege.

There is much confusion in the books and opinions of courts concerning the nature of the grant to a gas, water or other company to occupy the streets of a municipality or a public highway in the country with its pipes or railroad tracks. In-

[18] Suburban, etc., Co. v. East Orange (N. J.), 44 Atl. Rep. 628.

[19] People v. Gilroy, 67 Hun 323; 22 N. Y. Supp. 271.

A statute empowering city councils to pass ordinances prescribing the manner in which corporations shall exercise any privilege granted in the use of any street or in digging up the same for any purpose, is a mere regulative one, and does not authorize an arbitrary refusal to permit a gaslight corporation to lay its mains in the streets of the city, and the arbitrary refusal of the mayor of a city to grant such a permit amounts to a prohibition and is unauthorized. Gaslight Co. v. South River, 77 N. J. Eq. 487; 77 A. 473.

Removal of pipes pending litigation over the right of the company to occupy the streets will not be ordered. Gaslight Co. of New Brunswick v. South River, 77 N. J. Eq. 487; 77 Atl. 473.

Where a company was authorized to construct, lay and operate pneumatic tubes within and between cites, it was held that this did not by itself empower it to lay its tubes along the suspension bridge between New York City and Brooklyn without the consent of the officers in control of it. New York Mail, etc., Co. v. Shea, 30 N. Y. App. Div. 266; 51 N. Y. Supp. 563, reversing 49 N. Y. Supp. 951. See Glasgow v. Glasgow, etc., R. R. Co. [1895], App. Cas. 376; 64 L. J. P. C. 171; 72 L. T. 809; 59 J. P. 788; 11 Rep. 226.

deed, no writer upon the subject can escape falling into that confusion in the use of terms as he applies them to such grants. Sometimes they are called "franchises," sometimes "privileges," occasionally "grants." Now it is obvious to any one reflecting on the subject that a franchise is a very different thing from a contract — although a franchise has within it the elements of a contract — a license or a privilege. The granting of a franchise is the act of a sovereign power. An old definition of it is that it "is a royal privilege or branch of the king's prerogative subsisting in the hands of the subject, and being derived from the crown must arise from the king's grant." [20] Franchises has been defined by the Supreme Court of the United States as "special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right." [21] In a New York decision is both a definition and description of a franchise: "Franchises are privileges conferred by grant from government and vested in private individuals. They contain an implied covenant on the part of the government not

A company in Pennsylvania in good faith having laid pipes in the streets of a city, without consent of the city, prior to May 29, 1885, comes within the exception to Sec. 16 of that Act. Appeal of Allegheny (Pa.), 11 Atl. Rep. 658.

A statute may be broad enough to authorize a water company located in one village to lay its pipes through another village, without the latter's consent, in order to reach a third village it has contracted to supply with water. Tarrytown v. Pocontico W. W. Co., 1 N. Y. Supp. 394. See also Public Service Corp. v. De Grote, 70 N. J. Ch. 454; 62 Atl. Rep. 65.

As to California constitutional provisions, see *In re* Johnston, 137 Cal. 115; 69 Pac. Rep. 973.

A statute providing that no street should be dug into without permission of the city was held to constitute a mere gratuitous delegation of authority to the city to control the time, manner, method for, in, and by which the streets might be opened, and did not restrict a gas company's power to lay gas pipes in the street. Attorney General v. Consolidated Gas Co., 124 N. Y. App. Div. 401; 108 N. Y. Supp. Rep. 823; affirming 56 N. Y. Misc. Rep. 49; 106 N. Y. Supp. Rep. 407.

If consent to lay the pipes in a street is not necessary, then so long as they are in use the municipality cannot compel their removal. New York City v. New York, etc., Co. (N. Y.), 120 N. Y. Supp. Rep. 776. See Gaslight Co. v. South River, 77 N. J. Eq. 487; 77 Atl. Rep. 473.

[20] Board v. People, 91 Ill. 80.

[21] Bank of Augusta v. Earl, 13 Pet. 519, 595.

to invade the rights vested, and on the part of the parties to execute the conditions and duties prescribed in the grant." [22] A gas company may be incorporated and its charter authorize it to make and sell gas, although it have no privilege to lay its pipes in the streets of the municipality where located; and yet it would possess a franchise granted by the sovereign State unaccompanied by any privilege of laying its pipes in the streets, and have no contract with the municipality to furnish it gas; and should it after receiving the privilege, enter into a contract to furnish public lights at so much per light; — the distinction between such a contract and the company's franchise is quite clear. Usually, if not universally, a gas company is organized under a general statute authorizing its incorporation and its articles of incorporation contain a statement of the place of its home office and where it will operate; unless it is chartered by a special act of the legislature, and then the field of its future operations is almost universally specified. Such a company has no right to enter upon the streets of a municipality without its consent to lay its pipes, unless its charter or some statute expressly gives it that privilege. Usually the act of incorporation and the grant of a right to use the streets are almost simultaneous acts; and out of their coincidence in point of time has grown up the confusion between a franchise and the grant of a right or privilege to occupy the streets. The two things are entirely different; and yet there is dire confusion about their natures in both the text books and the written opinions of the courts. The Supreme Court of Michigan has pointed out the distinction we are endeavoring to show. "The exercise of the power of using streets for laying gas pipes is rather an easement than a franchise, and a similar power is used as often for private drainage and other purposes as for more general purposes. It is a matter peculiarly local in its character, and which should always be to a reasonable extent under a municipal supervision to prevent clashing among the

[22] Thompson v. People, 23 Wend. 537, 579. See State v. Weatherby, 45 Mo. 17; People v. Ridgely, 21 Ill. 65; Bridgeport v. New York, etc., R. R. Co., 36 Conn. 266.

many convenient uses to which ways must necessarily be subjected, for water, drainage and other urban needs. But the permission to lay these pipes does not differ in any respect from that required for laying railways over land, or ditches through it. It is not a State franchise, but a mere grant of authority which, whether coming from private owners, or public agents, rests in contract or license, and in nothing else. It in no way concerns the State whether the power is granted or withheld, nor whether the corporation has or has not fulfilled its agreements."[23]

§ 541. Nature of grant to occupy streets or highways.—A franchise.

Notwithstanding the line of reasoning pursued in the foregoing section, some courts have held that the grant of a city to a gas company to occupy its streets with lines of pipes to furnish gas is something more than a mere license or privilege

[23] People v. Mutual Gaslight Co., 38 Mich. 154. In this case leave to file an information in the nature of a *quo warranto* to have the charter of a gas company declared forfeited, because it had violated its contract with the city wherein it was located, was denied. In the same line see Palestine Water, etc., Co. v. Palestine, 91 Tex. 540; 44 S. W. Rep. 814; Providence Gas Co. v. Thurber, 2 R. I. 15; 55 Am. Dec. 621. That it is a license or permit, see Sandy Lake v. Sandy Lake, etc., Co., 16 Pa. Super. Ct. 234; Great Falls W. W. Co. v. Great Northern Ry. Co., 21 Mont. 487; 54 Pac. Rep. 963; Chicago, etc., Co. v. Lake, 130 Ill. 42; 22 N. E. Rep. 616; affirming 24 Ill. App. 346; Chicago R. R. Co. v. People, 73 Ill. 541; New Orleans Gaslight Co. v. Drainage Commission, 111 La. 838; 35 So. Rep. 929; affirmed 197 U. S. 453; 25 Sup. Ct. Rep. 471; 49 L. Ed. 831.

A gas *franchise* is property, a vested right protected by the constitution, while a *license* is a mere personal privilege, and revocable, except in rare instances and under peculiar conditions. Elizabeth City v. Banks, 150 N. C. 407; 64 S. E. Rep. 189.

The Civil Code provides that the attorney general may maintain an action against a person who usurps, intrudes into, or unlawfully holds or exercises a franchise within the State. Under this provision it is held that the attorney general may not maintain an action against a gas company to prevent further exercise of its rights in certain streets on the ground that municipal grants or consents to use such streets have terminated by expiration of the period for which they were given, since such consents are not "franchises" within the statute, and since, if they were, the matter is a local one, within the control of the city, which may by appropriate proceedings effectuate any withdrawal of its consents. People v. Consolidated Gas Co., 115 N. Y. S. 393.

The charter right of a gas company to lay pipes on the highways is subject to the general power of the legislature. Attorney General v. Haverhill Gaslight Co., 215 Mass. 394; 101 N. E. 1061.

— it is a franchise. Chief among these is the New York Court of Appeals. In one case it was said: "At the threshold of the consideration of these questions, it will be well to have in mind the legal effect of the consent which the municipal authorities are authorized to give by the transportation corporation act. It operates to create a franchise, by which is vested in the corporation receiving it a perpetual and indispensable interest in the land constituting the streets of a municipality. It is true that the franchise comes from the State, but the act of the local authorities, who represent the State by its permission and for the purpose, constitute the act upon which the law operates to create the franchise. The State might grant the franchise directly to the corporation without the consent of the local authorities, and has done so in many instances; but the tendency of later years, which is well grounded in reason, is for the State to confer upon the local municipal authorities the right to represent it in the matter of granting franchises to the extent that the final act necessary to the creation of franchises must be exercised by such authorities. The legal effect of the consent, therefore, is the same as if the local authorities in form granted the franchise and the interest in the land." [24] In this same case it was conceded that, "The consent of the town authorities conferred upon the relator a franchise to carry on its business in the town, and to lay conductors in the streets and highways for the purpose of delivering gas; that such a franchise is property that cannot be destroyed or taken from it or renewed unless by the arbitrary act of the village authorities in refusing the permit to place the conductors under the streets." [25] It should be observed that in New York City, where this doctrine had its origin, the fee of the streets is in the City and not in the

[24] People v. Deehan, 153 N. Y. 528; 47 N. E. Rep. 787, reversing 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071.

[25] People v. Deehan, 153 N. Y. 528; 47 N. E. Rep. 787. See also People v. O'Brien, 111 N. Y. 1; 18 N. E. Rep. 692; Railroad Company v. Railroad Co., 32 Barb. 358, 364; Brooklyn v. Jourdan, 7 Abb. N. C. 23.

abutting property owner. In other States a similar rule has been adopted.[26]

§ 542. Acceptance of grant.

In whatever way a grant may be regarded, whether as a gift, donation or a contract, it is not complete until accepted; and until it is accepted it may be revoked. Acceptance is essential to its validity.[27] Usually the ordinance granting the right requires the company to file with the municipality a written acceptance of the grant; but where no such requirement is exacted it is not necessary. An acceptance may be evidenced by acts alone. Thus where the grantee was required by the ordinance to commence furnishing gas within five years at specified rates; and within four months it purchased land on which to erect its works, and in nine months made contracts; it was considered that these acts, having been performed in good faith, constituted a sufficient acceptance, and it was too late thereafter to repeal the ordinance.[28] The acceptance must be of the exact terms of the grant; a qualified acceptance is invalid. Not only must the acceptance be as broad as the

[26] Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; Palestine, etc., Co. v. Palestine, 91 Tex. 540; 44 S. W. Rep. 814; National Foundry, etc., Co. v. Oconto Water Co., 52 Fed. Rep. 29; Sharp v. South Omaha, 53 Neb. 700; 74 N. W. Rep. 76; People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406; Commercial, etc., Co. v. Tacoma, 17 Wash. 661; 50 Pac. Rep. 592; Joliet Gaslight Co. v. Sutherland, 68 Ill. App. 230.

The limiting of the time within which a gas company shall begin work does not effect the life of the corporation. *In re* Consolidated Gas Co., 56 N. Y. Misc. Rep. 49; 106 N. Y. Supp. Rep. 407, affirmed 124 N. Y. App. Div. 401; 108 N. Y. Supp. Rep. 823; Elizabeth City v. Banks, 150 N. C. 407; 64 S. E. Rep. 189; San Francisco v. Oakland Water Co., 148 Cal. 331; 83 Pac. Rep. 61; Stockton Gas & El. Co. v. San Joaquin County, 148 Cal. 313; 83 Pac. Rep. 54.

Where a city, in the exercise of the discretion given by its charter grants a franchise to a gas company to use its streets, alleys, and public grounds, it may limit such use to a particular purpose. Wheeling v. Natural Gas Co., 74 W. Va. 372; 82 S. E. 345.

A gas and electric light company, having pipes in a street before the amendment of Const. Art. 11, Sec. 19, October 10, 1911, had a vested right to occupy such part of the street and to make necessary repairs on such pipes which could not be impaired by the Constitution. Keppelman, Ex parte, 138 Pac. 346; 166 Cal. 770.

[27] Metropolitan Gas Co. v. Hyde Park, 27 Ill. App. 361; affirmed 130 Ill. 42; 22 N. E. Rep. 616; People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406.

The acceptance completes the contract. Sandy Lake v. Sandy Lake, etc., Co., 16 Pa. Co. Ct. Rep. 234; Morristown v. East, etc., Co., 115 Fed. Rep. 304.

[28] Metropolitan Gas Co. v. Hyde Park, 27 Ill. App. 361; affirmed 130 Ill. 42; 22 N. E. Rep. 616; Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739; 35 S. E. Rep. 994; 50 L. R. A. 142.

grant, but when made it will be construed as an agreement to obey all the valid ordinances of the municipality in relation to the grant and its subject matter. Thus where a gas company was granted the privilege of laying its pipes in the streets of a city, subject to the conditions of a prior ordinance fixing the conditions generally on which a company could occupy streets with its pipes; and the company by resolution filed with the city agreed to comply with the general ordinance "excepting so far as any of the terms of said ordinance may be held or adjudged illegal or unreasonable by courts," it was held that as the city council had never consented to such qualifications of the acceptance, and the company having enjoyed the privileges of such ordinance under its acceptance, it could not refuse to comply with certain provisions of the ordinance on the ground that after its acceptance it had been adjudged to be void.[29] It is not necessary to name all of the sections of an ordinance in an acceptance, where an attempt is to accept it by sections; for the acceptance of a single section will carry with it an acceptance of all the provisions of the ordinance.[30] A mere nominal acceptance is sufficient to bind the company after it has enjoyed the whole or a part of the privileges granted.[31]

§ 543. Gas company must comply with conditions of grant.

A gas company that desires to retain its rights in the streets must substantially comply with the conditions of the grant; and if it fail to do so, it may forfeit its rights therein.[32] The condition may be a precedent or a subsequent one. Thus where a natural gas company was required to have one or more gas wells in operation within a year as a condition precedent to the right to lay pipes in the streets, its right to lay such pipes

[29] Allegheny v. People's, etc., Co., 172 Pa. St. 632; 37 W. N. C. 442; 33 Atl. Rep. 704.

[30] Sewickley v. Ohio Valley Gas Co., 6 Pa. Co. Ct. Rep. 99, reversed but not on this point. 1 Monaghan. 97.

[31] Allegheny v. People's, etc., Co., 172 Pa. St. 632; 26 Pittsb. L. J. (N. S.) 410; 37 W. N. C. 442; 33 Atl. Rep. 704.

[32] Capital City Water Co. v. State, 105 Ala. 406; 18 So. Rep. 62; 29 L. R. A. 743; Sandy Lake v. Sandy Lake, etc., Co., 16 Pa. Co. Ct. Rep. 234.

was held not to accrue until it had at least one well in operation and that within the year.[33] Where the condition was that the company must furnish gas within one year, it was held that the acquisition of a two-years' lease of gas-works was not a compliance with the condition, so as to enable the company, after the expiration of the year, to enjoin the town in its attempt to prevent it laying its own pipes in the streets; nor was the condition complied with by building a gas apparatus under cover, and withholding all knowledge of it from those who were to receive the company's advantages until the year specified had elapsed.[34]

§ 544. Grant to occupy streets construed strictly.

Grants to occupy the streets of a city are strictly construed. As it is the use of public property for private gain, courts are careful to see that the rights of the public are protected; and also to see that the company receives nothing beyond what has been fairly granted. Nothing passes by implication except that which is necessary to carry into effect the grant.[35] In the New York case cited the court said: "The rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant. But the obvious intention of the parties, when expressed in plain language, cannot be ignored in a public any more than in a private grant. A construction that would lead to false consequences or unjust or inconvenient results, not contemplated or intended, should be avoided in a grant as well as in a statute. It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but

[33] Newark Gas, etc., Co. v. Newark, 8 Ohio S. and C. P. Dec. 418; 7 Ohio N. P. 76.

[34] Chicago, etc., Co. v. Lake, 130 Ill. 42; 22 N. E. Rep. 616; affirming 27 Ill. App. 346, for last proposition.

A city may require the gas company to pay for the privilege of using the streets; and such a requirement is not void on the ground that it is a means to raise general revenue, and thereby imposing an additional tax on the gas company not authorized by law. Columbus v. Columbus Gas Co., 76 Ohio St. 309; 81 N. E. Rep. 44.

[35] People v. Deehan, 153 N. Y. 528; 47 N. E. Rep. 787; State v. Boyce, 43 Ohio St. 46; 1 N. E. Rep. 17; Pensacola Gas Co. v. Pensacola, 33 Fla. 322; 14 So. Rep. 826; Tampa v. Tampa W. W. Co., 45 Fla. 600; 34 So. Rep. 631; Sapulpa v. Sapulpa Oil & Gas Co., 22 Okl. 347; 97 Pac. Rep. 1007.

imposes an obligation, upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations." [36]

§ 545. What streets company may occupy.— Sidewalk.

Where the ordinance granting the gas company the right to furnish gas to a municipality designates the streets it may occupy, it necessarily follows that it can occupy no other streets than those named without a further permit from the municipality, unless it has a charter which gives it the absolute right to occupy the streets without consent of municipal authorities. But if an ordinance gives it the right to occupy the streets, and is silent as to what streets, then the company can make its own selection; and it cannot be successfully urged that the ordinance is void.[37] As the sidewalks are a part of the street, a city may authorize a gas company to lay its gas mains therein.[38]

§ 546. Territory annexed to another municipality after grant made.

If a gas company is given authority to occupy the streets of a municipality; and thereafter a part of the territory of such municipality is cut off and annexed to another or erected into a new and separate municipality, the company has the right to continue in the use of the part so cut off, and even to occupy

[36] See Appeal of Pittsburg, 115 Pa. St. 4; 7 Atl. Rep. 778; Western Paving, etc., Co. v. Citizens' etc., Co., 128 Ind. 525; 26 N. E. Rep. 188; 28 N. E. Rep. 88.

A gas company cannot lose its right to occupy the streets of a municipality by the municipality being abolished. Public Service Corp. v. De Grote, 70 N. J. Eq. 454; 62 Atl. Rep. 65.

Limiting the time in the grant within which the company can open the streets has no effect on the life of the corporation. Attorney General v. Consolidated Gas Co., 124 N. Y. App. Div. 401; 108 N. Y. Supp. Rep. 823, affirming 56 N. Y. Misc. Rep. 49; 106 N. Y. Supp. Rep. 407.

[37] Kalamazoo v. Kalamazoo, etc., Co., 124 Mich. 74; 82 N. W. Rep. 811.

[38] McDevitt v. Philadelphia Gas Co., 160 Pa. St. 367; 28 Atl. Rep. 948.

In Pennsylvania a gas or other public company, in the application, must specify the territory it desires to occupy. *In re* Conshohocken Gaslight Co., 5 Pa. Co. Rep. 585.

A statute requiring a company to state in its application what streets it desires to occupy is complied with by a general designation of all the streets of the city. Myers v. Hudson, etc., Co. (N. J.), 44 Atl. Rep. 713; reversing 37 Atl. Rep. 618.

new streets opened up in that part of the territory so severed from the old municipal corporation.[39]

§ 547. New streets, right to occupy.— No streets specified.

If a gas company be given the right generally to supply gas to a municipality and to occupy its streets for that purpose, it has the right to occupy streets opened therein after the grant, as well as streets laid out in new territory. Thus where the grant was the "power of laying conductors for conducting gas in and through the public streets and highways of the town," it was held that the grant was co-extensive with the limits of the town, and was not confined to any particular street, highway, or other local division. The lower court held that the grant did not apply to streets not open when the grant was made; but its holding was reversed on appeal, the Appellate Court saying: "It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity or during the existence of the corporation or at least for a long period of time, and should be given effect according to its nature, purpose, and duration. There is no good reason for restricting its operation to existing highways, unless that purpose appears from the language employed. It is not claimed that any such limitation was expressed, and none can be im-

[39] People v. Deehan, 153 N. Y. 528; 47 N. E. Rep. 787; reversing 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071; Richards v. Citizens' etc., Co. (N. Y.), 104 N. Y. Supp. Rep. 927.

A statute may be so worded as to not authorize it to lay pipes in the streets of annexed territory. Landis Tp. v. Millville Gaslight Co., 72 N. J. Eq. 347; 65 Atl. Rep. 716.

An ordinance granting the right to use the streets of a city is not invalid because it provides that the right shall extend to territory thereafter annexed. Truesdale v. Newport (Ky.), 90 S. W. Rep. 589; 28 Ky. L. Rep. 840.

plied from the nature of the case. The language of consent confers the right to place the conductors in the streets, upon compliance with all reasonable regulations, not only as the streets then existed, but as subsequently enlarged. That is what the grant contemplated when made, and such is the fair meaning of the language used." [41]

§ 548. Sale or assignment of right in streets.

If the right to lay pipes in a street to supply gas or water be regarded as a franchise, then under the general principles of corporation law the right cannot be assigned, unless a statute authorizes it.[42] But if the right be regarded as a mere easement, license or privilege, then it may be assigned, unless the ordinance containing the grant forbid it.[43] The assignment does not prevent the grantor or the State, having a forfeiture declared in the hands of the assignee, even for acts of the assignor.[44] A gas company cannot lease its plant without the consent of the municipality.[45] The city or town may agree that the grant may be assigned; and a grant to the company or its assigns is sufficient to authorize an assignment without the farther consent of the city.[46] Where the sale and assignment

[41] People v. Deehan, 153 N. Y. 528; 47 N. E. Rep. 787; reversing 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071; People v. Cromwell, 89 N. Y. App. Div. 291; 85 N. Y. Supp. Rep. 878; Attorney General v. Consolidated Gas Co., 124 N. Y. App. Div. 401; 108 N. Y. Supp. Rep. 823, affirming 56 N. Y. Misc. Rep. 49; 106 N. Y. Supp. Rep. 407.

For the right of a company to cross unimportant streets without a permit, in order to complete its system, see National Gas Co. v. Pittsburg, 1 Pa. Co. Ct. Rep. 311.

[42] Thomas v. Railroad Co., 101 U. S. 71; York, etc., R. R. Co. v. Winans, 17 How. 30; Black v. Delaware, etc., R. R. Co., 22 N. J. Eq. 130; Gibbs v. Consolidated Gas Co., 130 U. S. 396; 9 Sup. Ct. Rep. 553; Chicago Gaslight and Coke Co. v. People's etc., Co., 121 Ill. 530; 13 N. E. Rep. 169; 2 Am. St. Rep. 124; reversing 20 Ill. App. 473; Brunswick Gaslight Co. v. United, etc., Co., 85 Me. 532; 27 Atl. Rep. 525; 35 Am. St. Rep. 385.

As for an instance not amounting to an assignment or lease, see Marlborough Gaslight Co. v. Neal, 166 Mass. 217; 44 N. E. Rep. 139.

[43] Commercial, etc., Co. v. Tacoma, 17 Wash. 661; 50 Pac. Rep. 592; Joliet Gaslight Co. v. Sutherland, 68 Ill. App. 230; State v. Laclede Gaslight Co., 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 22 Am. St. Rep. 789; *In re* Southern Illuminating Co., 5 Pa. Dist. Rep. 781.

[44] City Water Co. v. State (Tex.), 33 S. W. Rep. 259.

[45] Visalia Gas, etc., Co. v. Sims, 104 Cal. 326; 37 Pac. Rep. 1042; Bath Gaslight Co. v. Claffy, 74 Hun 638; 26 N. Y. Supp. 287.

[46] Los Angeles v. Los Angeles Water Co., 177 U. S. 558; 20 Sup. Ct. Rep. 736; American Water Works Co. v. Farmers' Loan and Trust Co., 73 Fed. Rep. 956; 20 C. C. A. 133; 36 U. S. App. 563; San Luis Water Co. v. Estrada, 117 Cal. 168; 48 Pac. Rep. 1075; State v. Laclede Gaslight Co., 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383.

of a franchise is permitted, the purchaser or assignee succeeds to all the rights and privileges of the assignor, even to the extent of excluding all other companies where the franchise assigned is of that character;[47] and assumes all its burdens, even to the extent of furnishing the city free gas when that privilege is contained in the original contract.[48] And the city, consenting to the assignment if that is necessary, is bound to carry out with the assignee its agreements made with the assignor.[49]

§ 549. Change of use of franchise.— Natural gas.

A gas company cannot use its powers for any purpose than those specified in its franchise; and it cannot use the streets for any other purpose than those named in the contract with the municipality. Illustrations of this have been given in discussing the question of exclusive franchises or monopolistic contracts. In the construction of special legislative grants all doubts are to be construed against the grantee, and liberally in favor of the public.[50] As has been stated, an exclusive franchise to maintain a horse car line is not violated by the grant of a franchise to maintain a car line by the use of electricity.[51] Nor does an exclusive franchise to furnish light by gas prohibit the introduction of public electric lights by another company.[52] So a statute upon the subject of gas, enacted long before natural gas came into use in the State, has no reference to natural

[47] South Side Gas Co. v. Southern, etc., Co., 18 Pa. Co. Ct. Rep. 529.

[48] Sandy Lake v. Sandy Lake, etc., Gas Co., 16 Pa. Supr. Ct. Rep. 234; Freeport v. Enterprise Natural Gas Co., 18 Pa. Supr. Ct. 73.

[49] Austin v. Bartholomew, 107 Fed. Rep. 349; 46 C. C. A. 327.

[50] State v. Payne, 129 Mo. 468; 31 S. W. Rep. 797; 33 L. R. A. 576; Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24; 11 Sup. Ct. Rep. 478; Townsend v. Brown, 24 N. J. L. 80; Black v. Delaware, etc., Co., 24 N. J. Eq. 455, 474; Tampa v. Tampa W. W. Co., 45 Fla. 600; 34 So. Rep. 631; Quimby v. Consumers' Gas Trust Co., 140 Fed. Rep. 362.

[51] Omaha, etc., Co. v. Cable, etc., Co., 30 Fed. Rep. 324.

[52] Newport v. Newport Light Co., 11 Ky. L. Rep. 840; 12 S. W. Rep. 1040; Saginaw Gaslight Co. v. Saginaw, 28 Fed. Rep. 529; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435; 4 S. E. Rep. 650. Nor may the gas company furnish electricity. State v. Murphy, 170 U. S. 78; 18 Sup. Ct. Rep. 505.

gas.[53] The natural conclusion from these cases to be drawn is that a gas company given the privilege to use the streets in order to furnish gas for public lighting cannot furnish electricity for light. Such in fact is the case. So a like conclusion is reasonably reached that a company given the privilege of the streets to lay pipes therein in order to furnish artificial gas cannot use such pipes in order to supply natural gas; and so it is decided.[54] Keeping in mind the strict construction and the cases already cited, it seems to be a rational conclusion that an artificial gas company having its pipes in the streets cannot use them for the purpose of supplying natural gas; and a natural gas company cannot use its pipes to supply artificial gas. Nor is it going beyond the legitimate course of reasoning from the decided cases to say that a company given a franchise to furnish gas for light, and the right to use the streets for that purpose, cannot use such streets to supply gas for heating purposes. It makes no difference that the gas belongs to the consumer as soon as it has passed through the meter (when meters are used), and the company thereafter has no control over it; for it is the use of the street in the transportation of the gas that is perverted. The grant is for the purpose of transporting gas for the purposes of light and not for heat; and whenever the company connives at the use of the gas so transported it vio-

[53] See § 742. Warren Gaslight Co. v. Pennsylvania Gas Co., 13 Pa. Ct. Rep. 310; affirmed 161 Pa. St. 510; 29 Atl. Rep. 101; Quimby v. Consumers' Gas Trust Co., 140 Fed. Rep. 362; Circleville L. & T. Co. v. Buckeye Gas Co., 69 Ohio St. 259; 69 N. E. Rep. 436; Harmer v. Brentford Gas Co., 13 Ont. W. Rep. 873; Wilson v. Tennant, 179 N. Y. 546; 71 N. E. Rep. 1142; affirming 61 N. Y. App. Div. 100; 70 N. Y. Supp. 2.

But a statute may be broad enough to include both kinds of gas. Compton v. People's Gas Co., 75 Kan. 572; 89 Pac. Rep. 1039; 10 L. R. A. (N. S.) 787; Chillicothe v. Logan Natural Gas Co., 8 Ohio N. P. 88; 11 Ohio S. & C. P. Dec. 24; Cline v. Springfield, 7 Ohio N. P. 626; 10 Ohio S. & C. P. Dec. 389. See Nairin v. Kentucky Heating Co. (Ky.), 86 S. W. Rep. 676; 27 Ky. L. Rep. 551; Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 940; Farnsworth v. Boro Oil & Gas Co., 75 Misc. Rep. 37; 134 N. Y. Supp. 348; affirmed 216 N. Y. 40; 109 N. E. 860.

[54] Findlay Gaslight Co. v. Findlay, 2 Ohio Cir. Ct. Rep. 237; 1 Ohio Cir. Dec. 463; Kentucky Heating Co. v. Louisville Gas Co. (Ky.), 63 S. W. Rep. 651; 23 Ky. L. Rep. 730.

The Pennsylvania corporation act of 1874, or the incorporation of gas companies, contemplates only com-

lates the privileges extended to it, and under cover of one privilege is insisting on another.[55]

§ 550. Use of streets to carry gas to another municipality.

A statute may authorize a gas company to lay its pipes in the streets of any municipality for distribution of gas and to use such pipes within the boundaries of such municipality for the conveyance of gas to another municipality in whose streets it has lawful authority to lay its pipes for the distribution

panies supplying the manufactured product, and does not authorize the creation of a corporation to supply natural gas. Emerson v. Commonwealth, 15 W. N. C. 425; 108 Pa. St. 111; Sterling's Appeal, 111 Pa. St. 35; 2 Atl. Rep. 105; 2 Cent. Rep. 49. But where a corporation was formed to supply gas for light, or heat, or both, and for other purposes, and its charter made no restrictions as to uses, it was held that it could supply natural gas for lighting, unless some other company had the exclusive right to do so. Hagan v. Fayette Gas Fuel Co., 21 Pa. Co. Ct. Rep. 503; 29 Pittsb. Leg. J. (N. S.) 229.

[55] See Warner Gaslight Co. v. Pennsylvania Gas Co., 161 Pa. St. 510; 29 Atl. Rep. 101; Hagan v. Fayette Gas Fuel Co., 21 Pa. Co. Ct. Rep. 503; 29 Pittsb. L. J. (N. S.) 229; Lebanon Gas Co. v. Lebanon Fuel, etc., Co., 5 Pa. Dist. Rep. 529; 18 Pa. Co. Ct. Rep. 223. A contract to supply natural gas for heat is not one to furnish it for light. Philadelphia Gas Co. v. Park Bros., 138 Pa. St. 346; 22 Atl. Rep. 86. See Johnston v. People's etc., Gas Co. (Pa.), 7 Atl. Rep. 167; 5 Cent. Rep. 564. See Nairin v. Kentucky Heating Co. (Ky.), 86 S. W. Rep. 676; 27 Ky. L. Rep. 551.

In Pennsylvania a single corporation cannot be chartered to manufacture and supply gas and also to supply heat by means other than gas (nor to portions of two counties). New Gaslight Co., 7 Pa. Dist. Rep. 151; 1 Dauph. Co. Rep. 22. But see Wilkes-Barre Light Co. v. Wilkes-Barre, etc., Co., 4 Kulp. 47.

In Kentucky, see Nairin v. Kentucky Heating Co. (Ky.), 86 S. W. Rep. 676; 27 Ky. L. Rep. 551.

A charter for the manufacture and supply of gas generally does not conflict with a prior franchise for the manufacture and supply of gas for light only, but carries with it no authority to supply gas for light. *In re* Philadelphia Gas Works, 1 Dauph. Co. Rep. 55; *In re* Charter of Gas Companies, 18 Pa. Co. Ct. Rep. 136; 5 Pa. Dist. Rep. 396. See Altoona Gas Co. v. Gas Co. of Altoona, 17 Pa. Co. Ct. Rep. 662.

A corporation under a special Act chartered to build works which may improve trade, may engage in the production and delivery of natural gas. Carother's Appeal, 118 Pa. St. 468; 12 Atl. Rep. 314; 11 Cent. Rep. 48.

A corporation whose business is limited by its charter to supplying a city and its inhabitants "with light and motive power generated by electricity, steam, or other artificial means, and to furnishing and supplying either said light, power or heat," has no power to purchase or operate a gas plant. Covington Gas Co. v. Covington (Ky.), 58 S. W. Rep. 805; 22 Ky. L. Rep. 796.

The fact that a consumer put the gas, after it passed through his meter, to a use for which the gas company was not authorized to furnish gas, will not work a forfeiture of the franchise. People v. Los Angeles Independent Gas Co., 150 Cal. 557; 89 Pac. Rep. 108.

of gas. Such a statute is constitutional.[55a] A statute which authorized a gas company to extend its main lines to any "neighboring" municipality, has been held sufficient to make the act applicable to municipalities of the county to which gas may be conveniently carried from a central plant. Such an ordinance is not bad because failing to limit the right to those municipalities in which the gas company has lawful authority to lay pipes to furnish gas.[55b]

§ 551. Ordinance void.—Estoppel.

If the ordinance granting the right to occupy the streets be void, yet if the company accept it, perform all its requirements, by constructing its works and laying its mains, the municipality will be estopped to set up that the company is in the streets without right; and if it has a contract with the municipality to furnish gas, has furnished it and received pay in part, the latter will also be stopped to set up that such contract is void.[56]

[55a] Public Service Corporation v. De Grote, 70 N. J. Eq. 454; 62 Atl. Rep. 65.

[55b] Millville Imp. Co. v. Pitman, etc., Gas Co., 76 N. J. L. 826; 71 Atl. Rep. 1134; Landis v. Millville Gaslight Co., 70 N. J. Eq. 454; 65 Atl. Rep. 716.

[56] Illinois Trust, etc., Bank v. Arkansas City, 76 Fed. Rep. 271; 22 C. C. A. 171; 40 U. S. App. 257; 34 L. R. A. 518. See Morristown v. East, etc., Co., 115 Fed. Rep. 304.

A statute prohibiting a town entering into a contract for public lights, but no contract should go into operation until authorized by a vote of its inhabitants, does not prevent it entering into such a contract with a company duly organized by a vote of such inhabitants without another vote. Lima Gas Co. v. Lima, 4 Ohio Cir. Ct. Rep. 22; 22 Wkly. L. Bull. 272; 2 Ohio Cir. Dec. 396.

Vetoing an ordinance after the time allowing a veto will not annul a contract made under it. Pennsylvania Globe Gas Co. v. Scranton, 97 Pa. St. 538.

If a gas company acquires private property and avails itself of the rights and benefits conferred by a void ordinance it is estopped to question the constitutionality of any part of its provisions. Wiler v. Logan, etc., Co., 27 Ohio Cir. Ct. Rep. 257.

If a gas company enter on the streets under a void ordinance, and occupy them with its pipes and mains, it cannot set up that the grant is void. Sandy Lake v. Sandy Lake, etc., Co., 16 Pa. Super. Ct. Rep. 234.

If a gas company occupy the streets without a permit, when one is necessary, the city can maintain an action to enjoin it, and also to enjoin the further use of its pipes already in use. Landis Tp. v. Millville Gaslight Co., 72 N. J. Eq. 347; 65 Atl. Rep. 716.

An ordinance giving a gas company the privilege to occupy its streets is not void because it does not provide payment for the use of the streets. La Harpe v. Elm. Tp., etc., Co., 69 Kan. 97; 76 Pac. Rep. 448.

§ 552. Gas company occupying streets is subject to municipal regulations.

A gas company occupying the streets of a municipality is subject to the reasonable rules and regulations of such municipality with reference to its opening and use of its streets; and it makes no difference whether such company has the right to occupy such streets without the consent of the municipality or not. The rules and regulations must of course be reasonable.[57] Usually requirements with reference to opening streets and laying pipes therein are inserted in the grant to the gas company; frequently they are in general ordinances in force at the time of the grant, and occasionally in the statutes of the State. In whatever phase they are presented, they must be obeyed by the company. In fact, there is nothing to prevent the municipality adopting such regulations after the grant to a company has been made, so long as they are reasonable, which are necessary for the protection of property and of the public, having a due regard for the rights of the company. Thus, it is a frequent requirement, one almost universally required, that the trenches in a street in which the pipes are laid shall be filled so as to leave the streets in as good a condition as they were before such trenches were opened; and under such an agreement a municipality has the right to insist on the work being done under such reasonable conditions and restrictions as shall make it certain that the work will be properly done.[58]

[57] Reading v. Consumers' Gas Co., 2 Del. Co. Rep. (Pa.) 437; Benton v. Elizabeth, 61 N. J. L. 693; 40 Atl. Rep. 1132, affirming 39 Atl. Rep. 683; Appeal of City of Pittsburg, 115 Pa. St. 4; 7 Atl. Rep. 778; Heman v. St. Louis, etc., Co., 75 Mo. App. 372; Kalamazoo v. Kalamazoo, etc., Co., 124 Mich. 74; 82 N. W. Rep. 811; State v. Murphy, 170 U. S. 78; 18 Sup. Ct. Rep. 505; Walla Walla v. Walla Walla Water Co., 172 U. S. 1; 19 Sup. Ct. Rep. 77; affirming 60 Fed. Rep. 957; Palestine, etc., Co. v. Palestine, 91 Tex. 540; 44 S. W. Rep. 814; People v. Chicago Gas Trust Co., 130 Ill. 268; 22 N. E. Rep. 798; 8 L. R. A. 497; Traverse City Gas Co. v. Traverse City (Mich.), 89 N. W. Rep. 574; *In re* Johnston, 137 Cal. 115; 69 Pac. Rep. 974.

[58] Kalamazoo v. Kalamazoo, etc., Co., 124 Mich. 74; 82 N. W. Rep. 811.

In Pennsylvania the courts have power to supervise the location of mains and pipes of a gas company laid in highways; but a decree requiring the company to lay its pipes on one side of a highway throughout all the territory covered by its charter, without regard to circumstances is an improper exercise of such power. Springfield Water Co. v. Suburban Gas Co., 8 Del. Co. Rep. 130; 14 York Leg. Rec. 135.

The regulations, although adopted subsequent to the date of the grant, may relate to the manner of laying the pipes, altering, inspecting, and repairing them, and the character thereof with respect to the safety of the public and its convenience, of course not contravening any statute.[59] The grant may require the pipes to be laid a certain distance below the surface of the street; but if that depth should conflict with the open sewers and the flow of the water in them, then that fact must be taken into consideration; and if the city reserves the right for its council to determine where the pipes of a water company shall be located, and to employ an engineer to see that the water works are so constructed as to properly protect the intetrests of the city, that does not confer on the engineer employed power to determine the location of the pipes. In such an instance, if the company locate and put in its pipes without any determination or direction of the council as such, its adoption of the plans of the engineer in no wise changes its responsibility.[60] If the contract with the company be that the pipes, even on private land, shall be "well and sufficiently closed up," and the land and premises be "made good," it is not a compliance with such contract to leave the soil covering the pipes in the trenches in places from two to two and a half feet above the original level.[61] A municipality may adopt an ordinance to prohibit gas companies laying pipes in the streets during the winter months, so as to prevent the streets becoming obstructed.[62] If

[59] Appeal of City of Pittsburg, 115 Pa. St. 4; 7 Atl. Rep. 778; Heman v. St. Louis etc., Co., 75 Mo. App. 372; Benton v. Elizabeth, 61 N. J. L. 693; 40 Atl. Rep. 1132, affirming 39 Atl. Rep. 683.

[60] Montgomery v. Capital City Water Co., 92 Ala. 361; 9 So. Rep. 339.

[61] Chisholm v. Halifax, 29 Nov. Sco. 402.

In this case it was also held that putting stones in the trenches so that they interfered with plowing the ground was not a breach of the contract.

Where an ordinance required repairs to be made within a specified time after notice given by the city to make them; and upon receiving such a notice work was begun within two days thereafter and prosecuted with due diligence, but not completed until the day after the time for completing the work had expired, it was held that there was a compliance with the requirements of the ordinance. Heman v. St. Louis, etc., Co., 75 Mo. App, 372.

[62] North Liberties v. North Liberties Gas Co., 12 Pa. St. 318.

there be a general ordinance in force, when the right to occupy the streets is granted, providing that all pipes laid in the streets should be laid a certain depth, and under the supervision of the street commissioners; and such grant is expressly made subject to all ordinances then or thereafter in force, such pipes must be laid under the supervision of such street commissioners.[63] An ordinance granting the right to lay and maintain pipes in the streets, reserving their location to the common council, does not mean when the location has once been determined upon and fixed that the municipality has exhausted its power in that respect and has no further power to regulate and change the location.[64] In its regulations all companies must be treated alike; and one cannot be denied privileges granted others. Thus where an ordinance required a special permit of the board of supervisors before poles for electric lighting could be erected in the streets, and a permit was issued to one company and denied to another, it was said that the latter company could maintain an action for a mandamus to compel the issuance to it of a proper permit, but it was also said that it could not enjoin the other company from erecting its poles.[65] But mandamus will not lie to compel a city to grant permits to lay wires in a street, where the company by virtue of its charter claims the right to lay them without complying with reasonable police regulations on the subject adopted by the city, such company not having offered to comply with them.[66]

[63] Wilkinsburg Gas Co. v. Wilkinsburg, 25 Pitts. L. J. (N. S.) 42.

A company having its pipe line, although occupying a private right of way, to transport oil through land which is traversed by a public street of a city, is subject to an ordinance prescribing the manner in which the pipe shall be laid and used. Benton v. Elizabeth 61 N. J. L. 693; 40 Atl. Rep. 1132; affirming 39 Atl. Rep. 683.

[64] Montgomery v. Capital, etc., Co., 92 Ala. 361; 9 So. Rep. 339.

[65] Mutual Electric Light Co. v. Ashworth, 118 Cal. 1; 50 Pac. Rep. 10. See also State v. St. Louis, 145 Mo. 551; 46 S. W. Rep. 981, where mandamus was held the proper writ to compel the granting of certain permits to a company already occupying the streets. In this case it was held that an ordinance was not void because it did not reserve to the city control over the works or business of the company or require it to serve the public.

[66] State v. Murphy, 170 U. S. 78; 18 Sup. Ct. Rep. 505.

Where the constitution of a State

§ 553. Injunction to protect company's rights in streets.

If a company has been properly granted the privilege to use the streets of a city — or has been granted a franchise in such streets, as is usually said — a court of equity will protect its rights by an injunction.[67] But where a municipality is not empowered to grant an exclusive franchise, a gas company with the grant of such a right cannot obtain an injunction to restrain another company obtaining a subsequent grant of the right to occupy the same streets.[68]

§ 554. Grant before company is organized.

It is no objection to the grant to a gas company of a right to lay pipes in the streets that it was made before the company was incorporated, if it, after its organization, accept the ordinance and enter upon the work of laying pipes before objection was made.[69]

gives corporations the right to lay gas mains or water pipes in the streets of municipal corporations, under the direction of the superintendent of streets, such municipalities cannot adopt an ordinance requiring a corporation to first obtain a permit before laying its pipes in the streets, the exercise of such authority not being an exercise of the police power. *In re* Johnston, 137 Cal. 115; 69 Pac. Rep. 973.

Even though a gas company has the authority without the consent of a city to occupy the streets, yet it is subject to proper police regulation of the city, to prevent the impairment of the streets for public travel. Dorrance v. Bristol, 224 Pa. 464; 73 Atl. Rep. 1015.

A city may require a gas company to lay its pipes in the alleys whenever practicable if ordered by its council, under a clause in a statute empowering such city to impose reasonable regulations upon gas companies using its streets. Traverse City Gas Co. v. Traverse City, 130 Mich. 17; 89 N. W. Rep. 574.

A city may require water mains to be removed and placed elsewhere, when no longer needed in the place where they are located. Asher v. Hutchinson Water, etc., Co., 71 Pac. Rep. 813.

[67] Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; Natural Gas Co. v. Pittsburg, 1 Pa. Co. Ct. Rep. 311; Goodson v. Richardson, L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. (N. S.) 142; 22 W. R. 337; La Harpe v. Elm Tp., etc., Co., 64 Kan. 97; 76 Pac. 448.

If a gas company does not have an exclusive franchise in a city, it cannot enjoin another gas company from laying pipes in the streets of such city, unless it show a special damage, either partially accomplished or threatened to it. Atlantic City Water Co. v. Consumers' Gas & Fuel Co., 72 N. J. Eq. 346; 65 Atl. Rep. 1119.

[68] Coffeyville, etc., Co. v. Citizens', etc., Co., 55 Kan. 173; 40 Pac. Rep. 326.

[69] Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739; 35 S. E. Rep. 994; 50 L. R. A. 142; Sharp v. South Omaha, 53 Neb. 700; 74 N. W. Rep. 76. See People v. Bowen, 30 Barb. 24.

§ 555. Length of grant franchise.

Unless the charter or a statute fixes a limit, or the contract with the city determines it, the length of time a gas company may maintain its pipes in the streets is unlimited;[70] and such limitation cannot be shortened by subsequent legislation. The grant of the right is in perpetuity;[71] and such is the presumption.[72]

§ 556. Termination of life of corporation before expiration of franchise.

Strictly speaking, a franchise expires with the corporation; but instances have occurred where grants of rights and privileges have been made to gas companies for a length of time that exceeded its corporate life; and some difficulties have arisen on that score. In an instance of that kind an ordinance was held not to be void. In the instance referred to the grant was to the company or its assigns; and the ordinance provided that the company might transfer all of its rights, privileges, property and franchise conferred by it to any organized gas company which should, within twenty days after the transfer, file its written acceptance of the ordinance's terms and give bond for the performance of all the agreements required of the original company. The grant extended beyond the limit of the corporate existence; but the contract with the city was upheld.[73] But such an ordinance cannot prolong the life of the corporation, it being construed as a valid contract only so long as the company has a corporate existence, as fixed by the statute or original articles of incorporation.[74]

[70] People v. Deehan, 153 N. Y. 528; 47 N. E. Rep. 787; 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071.

[71] People v. O'Brien, 111 N. Y. 1; 18 N. E. Rep. 692.

[72] Suburban Electric Light, etc., Co. v. East Orange (N. J. Ch.), 41 Atl. Rep. 865; Truesdale v. Newport (Ky.), 90 S. W. Rep. 589; 28 Ky. L. Rep. 840.

[73] State v. Laclede Gaslight Co., 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 22 Am. St. Rep. 789.

[74] State v. Payne, 129 Mo. 468; 31 S. W. Rep. 797; 33 L. R. A. 576.

§ 557. Consolidation of gas companies.—Division of territory.

Statutes may authorize two or more gas companies to consolidate; and when consolidated the new companies become vested with all the rights of the consolidating companies, and become bound by all the duties and obligations imposed on them by the statute or by the several ordinances granting them rights to furnish the municipality and its inhabitants with gas.[75] But a statute authorizing a consolidation of two or more companies does not authorize an existing company to consolidate with a company of individuals not yet incorporated as a company.[76] The ordinance by which a company is authorized to occupy the streets may be such as to forbid a consolidation with another company. Thus where the grant was upon the condition that the company would not enter into any combination with another company with respect to rates to be charged for gas, it was held that an agreement with another company in the city for a division of the territory to be lighted was a violation of the condition in the ordinance, although not such a breach as to work a forfeiture of the right to lay pipes in the streets named in the grant.[77] An agreement of two gas companies to divide the territory between them, where their respective grants cover the same ground and not to invade each other's separate territory is void, because of public policy.[78]

[75] People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406. See Bailey v. Citizens' Gaslight Co., 27 N. J. Eq. 196.

[76] New Orleans, etc., Co. v. Louisiana, etc., Co., 11 Fed. Rep. 277.

[77] Detroit v. Mutual Gaslight Co., 43 Mich. 594; 5 N. W. Rep. 1039.

[78] Gibbs v. Consolidated Gas Co., 130 U. S. 396; 9 Sup. Ct. Rep. 553; Chicago Gaslight and Coke Co. v. People's Gaslight and Coke Co., 121 Ill. 530; 13 N. E. Rep. 169; St. Louis v. St. Louis Gaslight Co., 70 Mo. 69.

A statute provided that a person for whose account a purchaser at a receiver's sale of all the franchises of a gas company should purchase such franchise should "be a body politic and corporate, vested with all the rights, title and interest in and to such company, and with all the rights, privileges, and franchises of the corporation," and that such person might organize a new corporation, as a body politic and corporate. It was held that such person as an individual had no power to convey such franchise to another person; and that when a corporation, the lessee of the person to whom such franchise was attempted to be conveyed, proceeds to exercise such franchise by opening and occupying the streets, it would be restrained. McCarter v. Vineland L. & P. Co., 73 N. J. Eq. 703; 70 Atl. Rep. 177.

The New York Stock Corporation Law, Laws 1890, p. 1073, c. 564, § 40, as amended by Laws 1902, p.

§ 558. Town becoming a city.

If a town has authorized a gas company to occupy its streets with its pipes, and has entered into a contract with it for gas, and afterwards becomes a city, the right of the company to occupy such streets is not affected by the change, nor is the contract annulled. In other words, the succession of one municipality to the territory of another does not change the rights of an existing gas company in the territory.[79]

1751, c. 601, permits a stock corporation to purchase stock of another corporation, if authorized by its certificate of incorporation, or if the corporation whose stock is purchased is engaged in a business similar to that of the purchasing corporation. Stock Corporation Law, Laws 1890, p. 1069, c. 564, § 7, as amended by Laws 1897, p. 313, c. 384, provides that no corporation shall combine with any corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life, and Laws 1897, p. 310, c. 383, and Laws 1899, p. 1515, c. 690, were enacted to destroy monopolies and prevent combinations in restraint of competition or the free pursuit of any lawful business. It was held that the consolidation under Laws 1884, p. 448, c. 367, of six companies engaged in the manufacture and sale of gas and electricity into a corporation to continue such business, and the subsequent purchase by such consolidated company of all, or a controlling interest in, the shares of other similar corporations, purchased to prevent competition, did not create a monopoly in contravention of said acts, as it left the field open to any company that might be organized with the approval of the commission provided for by Public Service Commission Law, Laws 1907, p. 889, c. 429. Order, *In re* Consolidated Gas Co. of New York (1907), 106 N. Y. S. 407; 56 Misc. Rep. 49, affirmed Attorney General v. Consolidated Gas Co. of New York, 108 N. Y. S. 823; 124 N. Y. App. Div. 401.

A contract between the holder of a fifty-year franchise to furnish natural gas to the inhabitants of a city and a gas corporation, owning natural gas wells and a system for distribution in the city, on one side, and a lighting corporation, authorized to furnish gas and to buy and sell gas, on the other, which bound the gas company to furnish gas during the life of the franchise to the lighting company for sale to the inhabitants of the city, and which provided that the gas company should control the prices of natural gas to the consumers for all purposes except for illumination, and that the lighting company might fix the rate for illuminating gas, and which provided that the lighting company could purchase gas from others at lower figures if the gas company refused to meet the lower prices, etc., is not invalid as in restraint of trade, for it is impossible for the consumers to be oppressed by a monopoly in natural gas under the terms of the contract. Ft. Smith L. & T. Co. v. Kelley, 94 Ark. 461; 127 S. W. Rep. 975.

[79] People v. Deehan, 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071; reversed 153 N. Y. 528; 47 N. E. Rep. 787; Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606; 33 N. W. Rep. 749.

§ 559. Injunction to restrain laying of pipes in streets.

It has been held that the laying of pipes in the street is not such a nuisance as will authorize a court of equity to restrain the persons laying them.[80] But this was a suit brought by an abutting property owner who did not own the fee in the street, and the obstruction of the street would last only two or three days.[81] But where there is an invasion of private grounds adjoining the street, an injunction will be granted upon proper application.[82] Of course, a municipality may always maintain a suit to prevent a gas company invading its streets and laying down pipes therein without its or the State's consent;[83] and so may a private land owner whenever the gas pipes will be an additional burden on the fee of the highway.[84]

§ 560. Pipe laid in street unlawfully laid out.

If a pipe line be laid in a street which has been unlawfully laid out, and the proceedings laying it out are declared void and set aside, because of the unconstitutionality of the statute authorizing its laying out, the owner of the pipe will not lose it nor can he be deprived of its use by the abutting land owner, if no question concerning the validity of the law was raised at the time the lands were taken for the purpose of a street.[85] The laying out of the street in such a case will be regarded the same as if a street that could be lawfully laid out had been laid out by *de facto* officers.

[80] Attorney General v. Cambridge Consumers' Gas Co., L. R. 4 Ch. 71; 38 L. J. Ch. 94; 19 L. T. (N. S.) 508; 17 W. R. 145, overruling L. R. 6 Eq. 282; 38 L. J. Ch. 94, 111; 17 W. R. 145; 17 Gas Jr. 427, 593, 867.

[81] Decision to the same point. Attorney General v. Sheffield Gas Consumers' Co., 3 De Gex, McN. and G. 304; 17 Jur. 677; 22 L. J. Ch. 811; 2 Gas J. 396, 419; 19 E. L. and Eq. 639; 1 W. R. 185. Otherwise if he owned the fee. Goodson v. Richardson, L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. (N. S.) 142; 22 W. R. 337; Deere v. Guest, 1 My. and C. 516; 6 L. J. Ch. 69.

[82] Chapman v. Crays' Gas Co., 13 Gas J. 448. Where an action for damages would furnish adequate relief, an injunction was refused. Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19.

[83] Brooklyn v. Fulton Municipal Gas Co., 7 Abb. N. C. 19; Landis Tp. v. Millville Gaslight Co., 72 N. J. Eq. 347; 65 Atl. Rep. 761 (enjoining continuing use of pipes already laid in the street).

[84] Goodson v. Richardson, L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. (N. S.) 142; 22 W. R. 337; Selby v. Crystal, etc., Co., 4 DeG. F. and J. 246; 31 L. J. Ch. 595; 8 Jur. (N. S.) 830; 6 L. T. (N. S.) 790; 10 W. R. 636.

[85] King v. Philadelphia Co., 154 Pa. St. 160; 26 Atl. Rep. 308; 21 L. R. A. 141; 41 Am. and Eng. Corp. Cas. 221.

§ 561. Revocation of grant.

The grant of a privilege, license or franchise, by whatever name it may be called, to occupy the streets of a municipality with gas pipes, for the purpose of supplying the public with gas, vests such a right in the gas company that the municipality cannot revoke or deprive it of such grant, unless it, by its course of action, has laid itself liable to a decree of forfeiture. The grant, when accepted, and especially after its terms have been complied with, becomes a contract protected by the Federal Constitution.[86] The only way it can be deprived of such a grant is for cause, and by due legal process.[87] "The privilege of the use of the public streets of a city or town, when granted by ordinance, is not always a mere license, and revocable at the pleasure of the municipality granting it; for if the grant is for an adequate consideration, and is accepted by the grantee, then the ordinance ceases to be a mere license, and becomes a valid and binding contract. And the same result is reached where, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner, so that to revoke it would be inequitable and unjust."[88] Such an ordinance cannot be repealed.[89]

[86] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; 6 Sup. Ct. Rep. 265; Gibbs v. Consolidated Gas Co., 130 U. S. 396; 9 Sup. Ct. Rep. 553; People's Gaslight Co. v. Hale, 94 Ill. App. 406; Walla Walla v. Walla Walla Water Co., 172 U. S. 1; 19 Sup. Ct. Rep. 77; affirming 60 Fed. Rep. 957; Chicago, etc., Co. v. Lake, 130 Ill. 42; 22 N. E. Rep. 616; affirming 24 Ill. App. 346; Southwest Missouri Light Co. v. Joplin, 113 Fed. Rep. 817.

[87] People v. Deehan, 153 N. Y. 528; 47 N. E. Rep. 787; reversing 11 N. Y. App. Div. 175; 42 N. Y. Supp. 1071.

[88] Chicago, etc., Co. v. Lake, 130 Ill. 42; 22 N. E. Rep. 616; affirming 24 Ill. App. 346; Illinois Trust, etc., Bank v. Arkansas City, 76 Fed. Rep. 271; 22 C. C. A. 171; 40 U. S. App. 257; 34 L. R. A. 518; State v. Laclede Gaslight Co., 102 Mo. 472; 14 S. W. Rep. 974; 15 S. W. Rep. 383; 22 Am. St. Rep. 789.

Where a city ordinance, granting to a gas company the right to lay its pipes in the city streets, and providing that the privilege was granted on the condition that the gas company should annually pay to the city a sum specified, declared that nothing therein should be construed as granting exclusive rights or preventing any other company from furnishing gas to the citizens of the city, the gas company was not relieved of liability to make the payments specified by reason of the fact that the city subsequent to the grant permitted other gas companies to lay pipes in its streets for the purpose of supplying gas for public and private use. City of Columbus v. Columbus Gas Co., 81 N. E. 440; 76 Ohio St. 309.

[89] People v. Kent (Ill.), 12 Nat. Corp. Rep. 193.

§ 562. Forfeiture of right to occupy streets for failure to perform duty.

There is no doubt of the right of a city to enforce a forfeiture of the right of a gas company to occupy its streets with its pipes on a continued failure to comply with its agreement. A single instance of failure would not, of course, be sufficient, although it might give a right of action to recover damages; but a continued failure will be. An illustration of this can be found in the case of a water company, where the court was of the opinion that a city might enforce a forfeiture for a continued failure to supply wholesome water in a sufficient quantity, even independent of a provision in the contract and ordinance that the exclusive franchise granted should be forfeited for such cause.[90] A promise on the part of the company to do better in the future is no defense.[91]

Notice of an intention to revoke its rights to the streets must be given to a gas company before the revocation takes place. Jersey City, etc., Co. v. Passaic, 68 N. J. L. 110; 52 Atl. Rep. 242.

[90] Palestine Water, etc., Co. v. Palestine, 91 Tex. 540; 44 S. W. Rep. 814; affirming 41 S. W. Rep. 659.

See where the word "pure" in a statute was construed to be "wholesome" with respect to water. Commonwealth v. Towanda Water Works (Pa.), 15 Atl. Rep. 440. Sand in water damaging elevators, liability to damages. Scottish, etc., Co. v. Toronto, 24 Ont. App. 208.

[91] Capital Water Co. v. State, 105 Ala. 406; 18 So. Rep. 62; 29 L. R. A. 743.

The owner of a franchise to lay pipes in the streets of a city, contracted with another to form a gas company, the owner to furnish the franchise and the other to furnish all the money to build the plant and lay the pipes. After such other person had laid some of the pipes, he abandoned the work. It was held that since the pipes had become attached to the easement belonging to its owner, such owner became the owner by reason of the abandonment, and such other person had lost all rights in the pipes. Joliet Gaslight Co. v. Sutherland, 68 Ill. App. 230. The same line of reasoning would lead to the conclusion that the gas company would also lose its rights to remove its pipes, if it was to abandon the enterprise before its completion; and perhaps where a forfeiture was declared. *Quaere*, if such were the case, would the city or abutting property owners become the owners of the pipes?

Where an ordinance granting a gas company the right to enter a municipality and occupy its streets is silent as to the duration of the franchise, and the company voluntarily forfeits its right to exercise its privileges within the municipality, and withdraws therefrom, the municipality has no right to prevent it from removing its property or to take possession of and make use of the same, nor to grant the right to use it to another company without due process of law. East Ohio Gas Co. v. Akron, 81 Ohio St. 33; 90 N. E. Rep. 40.

§ 563. Actions to declare forfeiture.—Quo warranto.

There is not such a uniformity in the decisions with reference to the enforcement of a forfeiture of a franchise because of a violation of a contract with a municipality as is desirable. In Michigan a petition for leave to file an information in the nature of a *quo warranto* to declare a forfeiture of a franchise of a gas company, on the ground that it had failed to keep its contract with the city was refused; the court declaring that the right under the contract to occupy the streets with gas pipes was a mere license, and one in which the State had no concern, its violation being merely a matter between the company and the city.[92] A similar decision was made in New York.[93] But there are a number of instances where it is held that the State may bring the suit to have the charter declared forfeited because of a persistent violation of the company's contract with the city.[94] In one case it was also held that the fact of the city having the power to proceed against the company for infractions of its duty, which was enforced by its charter and the contract, was not a bar to the State to bring an action because of such infractions.[95] And the reverse of this was held where the city brought the suit to amend the contract because of the violation of its terms.[96] No doubt the State may bring an action to have a forfeiture declared in all those instances where the company is guilty of a violation of the laws of the State, aside from the violation of its contract with or grant from the municipality; for such is a violation of the general corporation laws.[97] Such is an instance where a statute fixes the price at which gas must be supplied;[98] or where it has

[92] People v. Mutual Gaslight Co., 38 Mich. 154.

[93] People v. Bowen, 30 Barb. 24; affirmed 21 N. Y. 517.

[94] Capital City Water Co. v. State, 105 Ala. 406; 18 So. Rep. 62; 29 L. R. A. 743; Commonwealth v. Towanda Water Works (Pa.), 15 Atl. Rep. 440; State v. Janesville, etc., Co., 92 Wis. 496; 66 N. W. Rep. 512.

[95] Capital City Water Co. v. State, 105 Ala. 406; 18 So. Rep. 62; 29 L. R. A. 743.

[96] Palestine Water, etc., Co. v. Palestine, 91 Tex. 540; 44 So. W. Rep. 814; affirming 41 S. W. Rep. 659.

[97] State v. Cincinnati, etc., Co., 18 Ohio St. 262; State v. Columbus, etc., Co., 34 Ohio St. 572; State v. New Orleans, etc., Co., 2 Rob. (La.) 529; Wandsworth, etc., Co. v. Wright, 19 Gas. J. 407; 18 W. R. 728.

[98] State v. Columbus, etc., Co., *supra*.

usurped the exclusive privilege of furnishing gas in a city in violation of a statute.[99] The State may, however, by its conduct or acquiescence be estopped to question the right of the company to continue as a corporation; especially so where the illegal acts took place long time before — as eight years for instance — and where some of the present stockholders were guilty of abetting such violation.[100] A pretended sale of all the company's property will not deprive the State of its right to forfeit its charter, even in the hands of the vendee, for a failure to perform a corporate duty.[101]

§ 564. Waiver of right to declare forfeiture.

By its course of conduct a municipality may waive its right to declare a forfeiture for failure to comply with the terms of a contract, just as it may be estopped to have a void contract set aside. Thus where a city in an ordinance granting a franchise provided that if certain things should not be done within fifteen months the company should forfeit its rights, it was considered that the city had waived any forfeiture by recognizing the ordinance in force after the fifteen months, by maintaining its own wires upon the electric company's poles, in assessing and collecting taxes on the franchise granted, and in failing to set up a claim of forfeiture in a number of suits brought by the company against it to enforce certain rights given by the contract.[102]

§ 565. Changing grade of street.

The fact that a contemplated change of the grade of a street will interfere with the gas company's pipes does not prevent the

[99] State v. Milwaukee Gaslight Co., 29 Wis. 454.

[100] State v. Janesville Water Power Co., 92 Wis. 496; 66 N. W. Rep. 512.

[101] City Water Co. v. State, 88 Tex. 600; 32 S. W. Rep. 1033; 33 S. W. Rep. 259.

A violation of an injunction against the enforcement of unreasonable rules is not sufficient to authorize a decree of forfeiture, although it may be grounds for contempt proceedings. Newark v. Newark W. W. Co., 4 Ohio N. P. 341; 6 Ohio Dec. 518.

[102] Commercial, etc., Co. v. Tacoma, 17 Wash. 661; 50 Pac. Rep. 592. See Walla Walla v. Walla Walla Water Co., 172 U. S. 1; 19 Sup. Ct. Rep. 77, affirming 60 Fed. Rep. 957.

change, nor lay the city liable for damages to the company occasioned thereby. Nor is the city liable to the company for the expense incurred in lowering or otherwise changing its pipes so as to conform to the new grade.[103] Nor can the gas company impose upon adjacent lot owners, the expense it has incurred in taking up and relaying its pipes, required by a change of grade; it must make such changes at its own cost.[104] If it is necessary to place drainage pipes or sewers in the street, the municipal authorities may compel the company to raise or lower its pipes, if such action be necessary to secure a proper location for them.[105] Under a statutory power to contract for lighting of its streets upon such terms and conditions as it shall deem expedient, a city is empowered to agree, in the original grant of a franchise, that it will reimburse the gas company for all damages occasioned it by a change in the grade of a street.[106]

§ 566. Construction of sewers interfering with pipes.—Cost of removing pipes.

A right extended to a gas company to lay its pipes in the streets of a city, so as to produce the least inconvenience to

[103] Belfast Water Co. v. Belfast, 92 Me. 52; 42 Atl. Rep. 235; Columbus, etc., Co. v. Columbus, 50 Ohio St. 65; 33 N. E. Rep. 292; 19 L. R. A. 510; Jamaica Pond, etc., Co. v. Brookline, 121 Mass. 5; Roanoke Gas Co. v. Roanoke, 88 Va. 810; 14 S. E. Rep. 665; Brenham v. Brenham Water Co., 67 Tex. 543; 4 S. W. Rep. 143; National W. W. Co. v. Kansas City, 20 Mo. App. 237; National W. W. Co. v. Kansas City, 28 Fed. Rep. 921; Rockland W. W. Co. v. Rockland, 83 Me. 267; 22 Atl. Rep. 166; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453; 25 Sup. Ct. Rep. 471; 49 L. Ed. 831, affirming 111 La. 838; 35 So. Rep. 929; Hoffman v. Mitchell, 201 Fed. 506; 120 C. C. A. 634.

The expense of relocating gas pipes in constructing a sewer must be borne by the gas company owning the pipes, and cannot be included in the assessment for the improvement. Walker v. North Bergen Tp. (N. J. L.), 86 Atl. 63.

[104] *In re* Deering, 93 N. Y. 361; Pocatello Water Co. v. Standley, 7 Idaho 155; 61 Pac. Rep. 518; Southwark, etc., Co. v. Wandsworth [1898], 2 Ch. 603; 67 L. J. Ch. 657; 79 L. T. 132; 47 W. R. 107; 62 J. P. 756.

[105] Bryn Mawr Water Co. v. Lower Marion Tp., 15 Pa. Co. Ct. Rep. 527; 4 Pa. Dist. Rep. 157.

[106] Parfitt v. Furguson, 3 N. Y. App. Div. 176; 73 N. Y. St. Rep. 621; 38 N. Y. Supp. 466; affirming 159 N. Y. 111; 53 N. E. Rep. 707.

the city or its inhabitants, gives no vested right to occupy any particular position in the street. It only acquires an imperfect right contingent and conditional in its nature, controlled by law and the regulation of the police authorities. The privilege is accepted subject to the inalienable right of the State to construct, or authorize the city to construct, sewers under the streets whenever it is of the opinion that public interest demands their construction; and may compel the company to change the location of its pipes at its own expense.[106a]

§ 567. Tearing up streets.—Obstructions.—Indictment.

No one can open streets and lay down pipes with which to supply the inhabitants of the municipality with gas or water unless authorized so to do. If he do so, without proper authority, he is subject to indictment and punishment.[107] If a

[106a] New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453; 25 Sup. Ct. Rep. 471; 49 L. Ed. 831; affirming 111 La. 838; 35 So. Rep. 929.

The owner of land on both sides of a highway made a tunnel under the road in order to connect his two properties. A gas company having power to lay pipes in the highway laid them through this tunnel. It was held that the tunnel was a "building" within the meaning of the statute, forbidding the laying of pipes through a building, and therefore the company had no power to lay pipes through it; and that the tunnel in question was not a "tunnel" within the meaning of the statute with which it could interfere, the word "tunnel" as used being ejusdem generis with sewers and drains. Schweder v. Worthing Gas Light & Coke Co., 81 L. J. Ch. 102; 1 Ch. 83; 105 L. T. 670; 76 J. P. 3; 10 L. G. R. 19; 56 Sol. J. 53; 28 T. L. R. 34.

Where it is possible to construct a sewer without injury to city gas mains, the city may recover damages from the contractor because of his negligent construction, when it has to pay damages to a third person caused by such contractor's negligence. But the contractor is not liable if damage necessarily resulted from the construction, since the city does not abdicate its paramount right to a street by giving a franchise therein to a public service company; and the gas company's franchise is subordinate to the city's control of the streets, if reasonable care be used in the construction of the sewer, yet if it was possible to construct the sewer without damages to the gas mains, then the contractor is liable. Portland Gas & Coke Co. v. Giebisch (Ore.), 165 Pac. 1004.

[107] Attorney General v. Sheffield Gas Consumers' Co., 3 De G. M. and G. 304; 22 L. J. Ch. 811; 17 Jur. 677; 1 W. R. 185; 2 Gas. Jr. 396, 419; 19 Eng. L. and Eq. 639; Regina v. Sheffield Gas Consumers'

company open more streets than is necessary, at any one time, it may be indicted; but if it has agreed to pay the municipality so much per square yard for all of the surface removed, it cannot defend on the ground that in so doing it was liable to indictment and therefore the agreement was void.[108] It is not an indictable nuisance to temporarily obstruct a street in laying down pipes under authority given.[109] But where the highway was eight yards wide, and the gas company dug three trenches, two across it and one parallel with it, these three trenches being kept open at night, but closed at three o'clock in the morning; and later other trenches were opened from eleven at night until two o'clock next afternoon, it was held that the company was liable to an indictment for unnecessarily obstructing a highway.[110] And where a gas company had no authority to lay its pipes in the street, an abutting property owner who took up the pavement, placed bricks and earth therein, so as to obstruct the highway, to put in a service pipe, was held subject to an indictment, and that he could not justify his actions on the ground that every householder had the right to make such temporary obstruction of a footway or highway as was necessarily incident to the enjoyment of his property.[111]

§ 568. Cutting into modern pavements.—Repairs.—Permission.

The grant of a right by a municipality to lay and repair mains in its streets cannot be subsequently taken away from it on the ground that new and other methods of improving the streets have been introduced since the original grant has been made; and especially is this true where the grant bound the

Co., 18 Jur. 146, note; Regina v. Longton Gas Co., 2 E. and E. 651; 29 L. J. M. C. 111; 6 Jur. (N. S.) 601; 2 L. T. (N. S.) 14; 8 W. R. 293; 8 Cox C. C. 317; Attorney General v. Cambridge Consumers' Gas Co., L. R. Ch. 71; 38 L. J. Ch. 94; 19 L. T. (N. S.) 508; 17 W. R. 145.

[108] Edgeware Highway Board v. Harrow District Gas Co., L. R. 10 Q. B. 92; 44 L. J. Q. B. 1; 31 L. T. (N. S.) 402; 23 W. R. 90.

[109] Preston v. Fullwood, *supra*. But see Hawkins v. Robinson, 37 J. P. 662, and Wright v. Stears, 48 Gas J. 1068.

[110] Regina v. Colne Valley Gas Co., 29 Gas J. 498, 781; 30 Gas J. 218.

[111] Regina v. Longton Gas Co., 2 Ell. and Ell. 651; 2 L. T. (N. S.) 14; 8 Cox C. C. 317; 29 L. J. M. C. 118; 8 Gas J. 165; 9 Gas J. 114; 6 Jur. (N. S.) 601; 8 W. R. 293.

company to speedily repair the portions of the street it had opened for the purpose of laying and repairing its mains. Nor can a municipality by a subsequent ordinance require a company to first obtain permission of it to lay or repair its mains, when it had that right, without first obtaining such permission, under its original grant or franchise. "The appellee," said the Indiana Supreme Court, "had been granted the right to use the streets for the purpose mentioned, and the mere fact that any particular street was thereafter paved with brick or macadam would not deprive appellee of exercising its rights under the ordinance upon which it relies. This is manifest when we recognize that the conditions of the bond required of the corporation availing itself of the franchise granted were, that all streets should be restored to as good a condition as they were before, and to maintain the pavement in good repairs where the city had an agreement with the contractor to like effect. As said by the learned counsel for appellee: 'If a macadamized pavement covers up the appellee's rights, so would one constructed of gravel, and so would even slight repairs, for the conditions of the streets would be changed from what it was when the ordinance was accepted.' It is evident, we think, that the contention has no support." Of the ordinance requiring permission of the city board of works before a pavement would be cut into for repairs, the court also said: "We judicially know that by reason of changes occurring from extensive heat, cold and pressure, leaks will and do occur in gas pipes, which require immediate repair. If, then, it should be held that in making these repairs—wherein it would be necessary to uncover the mains—the appellee must await the pleasure of the council and board of aldermen in giving consent, it would be virtually in the same condition as though it had not secured the rights and franchise under" the prior ordinance.[112] So an ordinance forbidding a gas company to excavate in a paved street in order to lay pipes from its mains to the opposite side of the street is so unreasonable as to be void.[113]

[112] Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107; 39 N. E. Rep. 433; 27 L. R. A. 514. See Western Paving, etc., Co. v. Citizens', etc., Co., 128 Ind. 525; 26 N. E. Rep. 188; 28 N. E. Rep. 88.

[113] Northern Liberties v. Northern Liberties Gas Co., 12 Pa. St. 318.

§ 569. Gas company repairing street.

As a rule, the gas company must restore the streets it opens in order to lay therein its pipes. But unless there be some special agreement between it and the municipality concerning repairs, it is only required to leave them in the same condition in which it found them and is not bound to keep them in repair that portion of them which it temporarily digs up.[113a] Where a city council, under a statute reinstated the surface of a street that had been broken up by a gas company under statutory powers, it was held that the city was entitled to recover, as part of the expense of reinstating the surface, the expense of placing a course of concrete where there had been previously no concrete, or the cost of placing an extra thickness of concrete where there had previously been concrete, if the concrete or extra concrete was necessary in order that the surface should be made as good, and should remain as good as it had been before the excavation.[113b]

§ 570. Injury to pipes in repairing streets.

A municipality has the right to repair the streets in which gas pipes are lawfully laid, but it must in doing so have a just regard for the property of the gas company. It may not repair them in a manner to injure such pipes, when at least the repairs can be so made, although in a less convenient way. Thus where the fee of the street was vested in the vestry of the parish, the pipes were lawfully located in the street, and in re-

[113a] Seltzer v. Amesbury, etc., Co., 188 Mass. 242; 74 N. E. Rep. 339; Pottsville v. Pottsville Gas Co., 33 Pa. Super. Ct. 480. In this last case was involved a charge of the city for inspection at $3 per day and the length of time the inspection was to continue.

[113b] Commercial Gas Co. v. Poplar Borough Council, 94 L. T. 222; 70 J. P. 178; 4 L. G. R. 267; Brame v. Commercial Gas Co., 84 L. J. K. B. 570; [1914] 3 K. B. 1181; 111 L. T. 1099; 79 J. P. 55; 12 L. G. R. 1270; Covington v. Exterkemp, 158 Ky. 599; 165 S. W. 967 (gas company had refilled trench, but left it with city to replace the brick surface under a regulation prohibiting it from restoring the brick. A boy ran into the excavation and was injured. Company held not liable). Not liable for sand piles left in street by its contractor employed to restore the street surface. Pine Bluff Natural Gas Co. v. Senyard, 108 Ark. 229; 158 S. W. 1091.

pairing them it used a steam roller, being a mode of repair most advantageous to both the taxpayers and the public, but the roller was so heavy as to injure the pipes; the court not only gave damages to the gas company, but declared that it was entitled to an injunction to restrain the use of the roller in such a way as to injure the pipes.[114] In Ireland an injunction was entered "against using any steam roller on any road under which the gas pipes of the plaintiffs have been laid so as to break or injure any pipes then properly laid under such road, regard being had to what, at the time of the laying of such pipes, was then the ordinary traffic, and the then reasonable means of repairing and maintaining the road."[115] If a city let a contract to construct a sewer to a contractor it knows to be incompetent, it will be liable for damages to a gas company's pipes which he may, because of such incompetency, occasion them.[116] But the city is not liable where it builds a sewer itself, and injures the pipes of a company, if the injury is not inflicted because of negligence on its part.[117] Where a gas company, in ignorance of the true location of its pipe line in a certain street, though both its bookkeeper and collector told a street railway it was in the middle of such street, the bookkeeper and collector believing the statement to be true, and the railway company having made the inquiry in order that it might avoid laying its track over such pipe line, all of which the gas company knew at the time it gave the supposed location

[114] Gaslight and Coke Co. v. Vestry of St. Mary, 15 Q. B. Div. 1; 54 L. J. Q. B. 414; 53 L. T. 457; 33 W. R. 892; 49 J. P. 459.

[115] Alliance, etc., Gas Co. v. Dublin, Gas Jr., June 26, 1900, p. 1733, and July 10, 1900, p. 100. See 49 Gas Jr. 765, 811; 50 Gas Jr. 1018.

Where a heavy roller broke a gas main, whereby gas escaped into a house and caused an injury, it was held that there was evidence of negligence against the municipality. Driscoll v. Public Board of Works, 14 T. L. Rep. 99; 62 J. P. 40.

[116] Norwalk Gaslight Co. v. Norwalk, 63 Conn. 495; 28 Atl. Rep. 32.

[117] Brunswick Gaslight Co. v. Brunswick, 92 Me. 493; 43 Atl. Rep. 104; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453; 25 Sup. Ct. Rep. 471; 49 L. Ed. 831, affirming 111 La. 838; 35 So. Rep. 929.

A city in putting in its own gas works is liable for trespass if it interfere with and injure a private system for supplying gas therein, which has been established under authority of law. Boyer v. Little Falls, 5 N. Y. App. Div. 1; 38 N. Y. Supp. 1114.

of its pipe line; and thereupon the railway company laid its track on one side of the street but immediately over the pipe line, being misled by such statements as to its true location, it was held that the gas company was not estopped to take up its pipe in order to repair it, although in so doing it had to remove the track of the railway company. The court did not consider that the bookkeeper and collector were such agents as to make their statements about the location of the pipe line binding upon the gas company. It was declared, though, that it was the gas company's "duty to know the precise location of their pipes, and to be able to give correct information concerning the same to those who had a right to demand it; and if a gas company wrongly represents the location of its pipes, so as to lead a railway company to lay its track over them when it was seeking to avoid them, then such company would be estopped from claiming the right to disturb the track, even though the gas company was mistaken in regard to the location of the pipes at the time the representations were made."[118]

[118] Davenport, etc., Ry. Co. v. Davenport Gaslight Co., 43 Ia. 301.

Before commencing to lay gas mains, a company gave a rival company notice of the proposed work and requested it to disclose the position of its mains, in order that the new mains might be laid at the statutory distance from the old mains. The old company absolutely refused to disclose the position of its mains, whereupon the new company proceeded. An attendant of the old company was present, but made no objection to the laying of pipes where the new company was putting them. The old company then brought a suit against the new company, praying for an injunction, for the purpose of harrassing and delaying the installation of the new company's plant. It was held that it was estopped from objecting to slight deviations in the new company's pipe line from the course prescribed by statute. Atlantic City Gas & W. Co. v. Consumers' Gas & F. Co., 73 N. J. L. 360; 65 Atl. Rep. 1119; affirming 70 N. J. Eq. 536; 61 Atl. Rep. 750.

A contractor constructing a sewer in a street wherein are gas pipes, is not an insurer against injury to the pipes; but removing the earth from beneath them and not furnishing them with support whereby they break, is a failure to use ordinary care not to injure them. Millville Gaslight Co. v. Sweeten, 75 N. J. L. 23; 68 Atl. Rep. 1067.

As to notice to a gas company by a street railway of an intention to lay its track in a street where gas pipes were located, and arbitration thereon under a statute, see Hastings Tramway Co. v. Hastings, etc., Gas Co., 76 L. J. Ch. 60; [1906] 2 Ch. 578; 70 J. P. 540; 23 T. L. R. 95; 95 L. T. 684; 5 L. G. R. 142.

Where a statute required a gas company to give three days' *notice* to local authorities of an intention

§ 571. Support of gas mains.

If a company has a right to lay its pipes in a street, it has a right to a support for them of the underlying soil; and if the owner of the underlying soil, or anyone mining therein, even with a right so to do, take away such support and injure the pipes, he will be liable in damages; and that, too, even though he is entitled to damages under an arbitration proceeding for the extra burden of the pipes upon the fee of the highway. What is true of one occupying the highway, is also true of one rightfully occupying a private right of way.[119] But if the gas company has laid its pipe line in the soil of another without license so to do, then it is not entitled to support; nor to compensation in damages for a failure to give it.[120]

§ 572. Gas boxes in street.

A gas box in the street, giving access to a cock in the service pipes conducting gas from the main to the house or building supplied with gas, is a part of the company's apparatus; and although lawfully in the street, the company is bound to exercise care to prevent injury to persons using the street or sidewalk.[121]

to lay pipes in a highway, it was held that it had no application to a highway not repairable by such local authorities, though it had been dedicated to the public, but not then taken over by such authorities. Redhill Gas Co. v. Rigate Rural Council, 80 L. J. K. B. 1062; [1914] 2 K. B. 565; 105 L. T. 24; 75 J. P. 358; 9 L. G. R. 814.

As to notice of a change in the size of pipe lines or other matter pertaining merely to the proper manner of laying them, when not necessary to give, see Vernon v. Los Angeles Gas & El. Co., 19 Cal. App. 364; 125 Pac. 1084.

The negligence of county officers, in ordering plaintiff operator of a steam roller to pass over gas mains, was held not to excuse the gas company for the plaintiff's injuries in an explosion thereby occasioned. McWilliams v. Kentucky Heating Co., 166 Ky. 26; 179 S. W. 24; L. R. A. 1916 A. 1224.

[119] Normanton Gas Co. v. Pope, 52 L. J. Q. B. 629; 32 W. R. 134; 49 L. T. 798. See Benfieldside L. B. v. Consett Iron Co., 3 Exch. Div. 54; 47 L. J. Exch. 491; 38 L. T. 530; 26 W. R. 114.

To remove the soil from beneath a gas pipe, in excavating to put in a sewer, and failing to support it, whereby it breaks, is a failure to use ordinary care not to injure the pipe. Millville Gaslight Co. v. Sweeten, 75 N. J. L. 23; 68 Atl. Rep. 1067.

[120] Middle, etc., Co. v. Oakbank Oil Co., 18 Ct. Sess. Cas., 4th Series 788.

[121] Washington Gaslight Co. v. District of Columbia, 161 U. S. 316; 16 Sup. Ct. Rep. 564; 24 Wash. L. Rep. 470, affirming 20 D. C. 39. In this case the consumer paid the cost of putting in the box. The city was allowed to recover from the company the amount of damages it had been compelled to pay a person injured by reason of the company having permitted the gas box to get out of repair. In England apparatus of this kind seems to belong to the consumer. Ward v. Folkstone W. W. Co., 24

The court, however, cannot say as a matter of law that a box seven and a half inches long and five and a quarter wide, by one and a half high, extending one and a half inches into the traveled portion of a sidewalk is not a nuisance, in the absence of any evidence showing the exigencies of public travel in the street.[122]

§ 573. Leaving gas posts in streets.

When gas posts are no longer used, it is the duty of the gas company to remove them, for they are an obstruction in the street. A gas company has the right to maintain gas posts in a street solely by reason of the fact that it supplies light for the streets; and when it ceases to supply the light, it must remove its posts, or else lay itself liable for such damages as may be occasioned thereby.[123]

§ 574. Pipes in streets not an additional burden.

Pipes of a gas company laid in the streets of a municipality are not an additional burden on the fee of the street for which the abutting lot owner is entitled to compensation. Such a burden is contemplated, in legal contemplation, when the streets are dedicated, or ground taken for them under the power of eminent domain.[124] Of course, the duty to serve the public is always an element underlying all grants of a right to use the streets; and this is considered the compensation that the abutting property owner receives for the use of his property.[125]

Q. B. Div. 334; 59 L. J. M. C. 65; 62 L. T. 321; 38 W. R. 426; 54 J. P. 628; Folkstone v. Downing, 54 Gas. J. 313.

[122] Staples v. Dickson, 88 Me. 362; 34 Atl. Rep. 168. But see Loan v. Boston, 106 Mass. 450.

[123] New Orleans Gaslight Co. v. Hart, 40 La. Ann. 474; 4 So. Rep. 415.

[124] Smith v. Goldsboro, 121 N. C. 350; 28 S. E. Rep. 479; Boston v. Richardson, 13 Allen 160; Crooke v. Flatbush W. W. Co., 29 Hun 245; West v. Bancroft, 32 St. 367; Palmer v. Larchmont, etc., Co., 158 N. Y. 231; 52 N. E. Rep. 1092 (electric light poles). See Columbia Conduit Co. v. Commonwealth, 90 Pa. St. 307; Quincy v. Bull, 106 Ill. 337; 4 Am. and Eng. Corp. Cas. 554; Cheney v. Barker, 198 Mass. 356; 84 N. E. Rep. 492; Consolidated Gas Co. v. Commissioners, 99 Md. 403; 58 Atl. Rep. 214; Hardman v. Cabot, 60 W. Va. 664; 55 S. E. Rep. 756; 7 L. R. A. (N. S.) 506; Baltimore County, etc., El. Co. v. Dubrenil, 105 Md. 424; 66 Atl. Rep. 439; 9 L. R. A. (N. S.) 684; Aurora El., etc., Co. v. McWethy, 104 Ill. App. 479; affirmed 202 Ill. 218; 67 N. E. Rep. 9 (city owned fee of streets).

[125] Ampt v. Cincinnati, 6 Ohio N. P. 401; Witcher v. Holland

§ 575. Pipes laid in navigable river.

Nor may a gas company lay its pipe line on the bed of a navigable river; if it desires to cross such a stream it must bury its pipe line beneath the bed thereof. Thus where a company had full power to lay and maintain pipes for transportation of gas, laid an eight-inch main on the bottom of a navigable river it was crossing; and a steamboat came along, ran into the pipe without fault, and broke it, and gas thereby escaped, entered the furnaces of the boat and exploded, the gas company was held liable for all damages occasioned by the explosion; for the pipe was wrongfully placed on the surface of the river bed.[126] If a gas company has the right to lay its mains across a river, it must do so that they will neither impede nor hinder boats using such river; and if it do not, and the mains are injured by boats passing up and down the river, the gas company cannot recover damages for such injuries.[127] And if a gas main is so laid in a navigable river that it impedes navigation, a vessel caught in passing and detained thereby may recover as damages the actual expense of getting free from the obstruction, but not for delay in its business or other consequential damage.[128]

Water Works Co., 66 Hun 619; 20 N. Y. Supp. 560; affirmed 142 N. Y. 626; 37 N. Y. Rep. 565; Carpenter v. Lancaster, 250 Pa. 541; 95 Atl. 702.

In Palmer v. Larchmont, etc., Co., *supra*, it is said that the necessity for a light in a highway was for the municipal authorities to determine, and not for the court in a case of ejectment.

In Providence Gas Co. v. Thurber, 2 R. I. 15, it was held that a gas company having an incorporeal easement and not a mere license in the streets was estopped from claiming that its grant under the charter was void, because no compensation was provided thereby for the owners of the land through which its pipes passed.

[126] Omslear v. Philadelphia Co., 31 Fed. Rep. 354.

[127] Milwaukee Gaslight Co. v. Schooner Gamecock, 23 Wis. 144. See Municipal Chamber of Hamburg v. Gas Company, 5 Gas. J. 710.

[128] Benson v. Malden, etc., Co., 6 Allen 149.

As to being deprived of use of public wharf by a gas company, see Wetmore v. Brooklyn Gaslight Co., 42 N. Y. 384; rent therefor, People v. San Francisco, 54 Cal. 248; and tolls, Soule v. San Francisco, 54 Cal. 241.

A statute may authorize a gas company to use a toll bridge in crossing a river, upon paying compensation. Taff Vale Co. v. Cardiff L. & C. Co., 71 J. P. 350; 5 L. G. R. 993; 23 T. L. R. 528.

If a gas company so befoul a river as to work a private (not a public) injury, it will be liable to the person injured. Manhattan Gaslight Co. v. Barker, 7 Robt. (N. Y.) 523.

§ 576. Grant of right to use suburban highway.—Compensation to abutting land owner.

The owner of land abutting on a rural highway has such an interest in it that the legislature cannot authorize gas companies to lay their pipe lines in it without providing a method for compensating him for all damages he may suffer by reason of the additional burden upon the fee.[129]

[129] Consumers', etc., Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640; Kincaid v. Indianapolis, etc., Co., 124 Ind. 577; 24 N. E. Rep. 1066; 8 L. R. A. 602; Board v. Indianapolis, etc., Co., 134 Ind. 209; 33 N. E. Rep. 972; Krueger v. Wisconsin Tel. Co., 106 Wis. 96; 81 N. W. Rep. 1041; 50 L. R. A. 298; Postal Telegraph and Cable Co. v. Eaton, 170 Ill. 513; 49 N. E. Rep. 365.

State v. Kansas, etc., Co., 71 Kan. 508; 80 Pac. Rep. 962; Richards v. Citizens' etc., Co., 124 N. Y. App. Div. 401; 104 N. Y. Supp. Rep. 927; La Harpe v. Elm Tp. Gas, etc., Co., 69 Kan. 97; 76 Pac. Rep. 448; Ward v. Triple State, etc., Co., 115 Ky. 723; 74 S. W. Rep. 709; 25 Ky. L. Rep. 116; Paine v. Calor O. & G. Co. (Ky.), 103 S. W. Rep. 309; 31 Ky. L. Rep. 754; Baltimore County, etc., Co., 105 Md. 424; 66 Atl. Rep. 439; 9 L. R. A. (N. S.) 684. *Contra*, Hardman v. Cabot, 60 W. Va. 664; 55 S. E. Rep. 756; 7 L. R. A. (N. S.) 506.

Where a statute provided that the county commissioners in granting franchises, should not destroy the vested rights in streets and highways, the grant of a right to lay pipes in a street and highway was held not objectionable as affecting private rights previously granted to another. Consolidated Gas Co. v. Commissioners, 99 Md. 403; 58 Atl. Rep. 214.

A town granted a water company the right to furnish water within its boundaries. Afterwards the town became part of a city, and the company, in order to furnish water, attempted to lay its pipes along a bare country road within the limits of another town which had become a part of the city. It was held that the road could not be appropriated without compensation to the owners of the fee, since the taking of the town's territory into the city did not change the nature of the country road to a street. Richards v. Citizens', etc., Co., 124 N. Y. App. Div. 401; 104 N. Y. Supp. Rep. 927.

In an action to enjoin the use of a highway for gas pipes, on the ground that the pipes are not maintained and the gas conveyed by means thereof for such purpose, the plaintiff must show the fact of non-user; and the defendant that the pipes are so maintained and gas so conveyed under his denial of the allegations of the bill. Hardman v. Cabot, 60 W. Va. 664; 55 S. E. Rep. 756; 7 L. R. A. (N. S.) 506.

That a street was named, that houses fronted on it and were numbered, and that a gas company was having pipes laid under it, was a sufficient showing it was a public street. O'Hara v. Laclede Gaslight Co., 131 Mo. App. 428; 110 S. W. Rep. 642.

That pipes cannot be laid in a country highway without the consent of the public authorities, see Hardman v. Cabot, 60 W. Va. 664; 55 S. E. Rep. 756; 7 L. R. A. (N. S.) 506; Twin Village Water Co. v. Damariscotta G. L. Co., 98 Me. 325; 56 Atl. Rep. 1112; and that it can, see Consolidated Gas Co. v. Baltimore County, 99 Md. 403; 57 Atl. Rep. 29; State v. Kansas Nat. Gas, etc., Co., 71 Kan. 508; 80 Pac. Rep. 962.

Where the highway commissioners acquiesce without objection in the acts of a gas company in laying its pipes in the streets for nearly half a century, it will be presumed that they had given their consent to the company's use of the streets. People v. Cromwell, 89 N. Y. App. Div. 291; 85 N. Y. Supp. Rep. 878.

§ 577. Condemnation of land owner's interest in highway.

Proceedings under the power of eminent domain, to condemn the abutting land owner's fee in the highway, does not affect the right of the public, nor give the gas company the right to use the highway without the consent of the public authorities. In addition to a judgment of condemnation, the gas company must procure the consent of the public authorities to use the highway.[130]

§ 578. Land owner acquiescing in occupation of rural highway.— Injunction.— Estoppel.

While an owner of land abutting upon a rural or suburban highway is entitled to compensation for the additional burden imposed by the laying of pipe lines in such highway, because of the additional burden they impose upon his land beneath the easement; yet if he stands by and makes no objection to the laying of the pipes until they are put to an actual use, he will be estopped to then prevent their use. This is especially true if the company laying the pipes is engaged in a public service. "There was an assertion of a right to use the highway," it was said in one case, "and the gas company had expended large sums of money on the faith of the license granted to it by the board of commissioners. It had assumed to use the highway for a public purpose, and many citizens had acquired rights upon the faith of the successful and effective prosecution and conduct of the work and business undertaken by the company. The appellant, with knowledge of the facts, made no objection until the completion of the main line and system, but delayed until they had been completed and then asked an injunction. To grant the relief he seeks will, it is clearly inferable, seriously impair the rights of the public as well as those of the gas company. We are satisfied

[130] Board v. Indianapolis, etc., Co., 134 Ind. 209; 33 N. E. Rep. 972. Where a gas company, by consent of the public authorities, lays a gas pipe in a public rural highway, the abutting landowner is entitled to recover the value of the estate taken, not as damages, but as compensation, and is also entitled to whatever damage results to his adjacent premises, whether the laying of the pipe was negligently done or not. Ward v. Triple State, etc., Co., 115 Ky. 723; 74 S. W. Rep. 709; 25 Ky. L. Rep. 116.

that upon the case made by the evidence, the appellant is not entitled to an injunction. In adjudging that he has no right to an injunction, we do not hold that he may not, in a proper case, recover damages for the invasion of his legal right. What we here decide is, that the case made is not one justifying resort to the extraordinary remedy of injunction. The effect of our decision is that he has mistaken his remedy. The work in which the gas company is engaged is one in which the general community have an interest, and to arrest the work by injunction would do great injury to many citizens. Persons other than the company have an interest, and they are so numerous that it is the duty of the courts to protect that interest where it can be done without materially impairing the rights of any private citizen, and that can be done in this instance, for the appellant, in the appropriate action and upon making a proper case, can be fully compensated for all injury that he may have suffered. There is here an element of public policy which exerts a controlling interest. The good of the community forbids that one who occupies such a position as the appellant does should be permitted to arrest work essential to the successful discharge of the company's duty to supply the community with fuel in the form of natural gas. Public policy, as has been demonstrated in analogous cases, requires that the rights of the community should be protected, and the land owner left to his remedy at law. Nor does this rule operate unjustly, for the land owner is not deprived of compensation; on the contrary, the right to compensation is left open to him, and it is his own fault if he does not recover full compensation for all the loss he has actually sustained. Blended with the element of public policy is another influential one, and that is this: The appellant objecting knowingly permitted the work to proceed until it reached a stage at which it would be ruinous to the company which had invested such large sums of money to stop it by injunction. These two elements, in their combined strength, certainly make a case in which an injunction should, upon plain principles of equity, be denied." [131] But the mere

[131] Kincaid v. Indianapolis, etc., Co., 124 Ind. 577; 24 N. E. Rep. 1066; 8 L. R. A. 602; Consumers', etc., Co. v. Huntsinger, 12 Ind. App. 285; 40 N. E. Rep. 34; Consumers', etc., Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640.

fact that the owner of the abutting land made no objection to laying pipe lines in one highway will not estop him to object to the laying of a pipe line in another highway upon which his land abuts.[132] So if the owner of the fee did not know of the laying of the pipe line in the highway at the time it was laid, the mere fact that he made no objections, after he found out the fact about it, to the line or its maintenance will not estop him from asserting a right to have it removed.[133]

§ 579. Pipe lines in country highway an additional burden on the fee.

The easement the public acquires in a right of way taken for a country or suburban highway is one solely of passage — a right to travel along it — and no other. "Subject to the right of the public," says the Supreme Court of Indiana, "the owner of the fee of a rural road retains all rights and interest in it. He remains the owner, and, as such, his rights are very comprehensive. . . . The appropriation of the land for a rural highway did not entitle the local officers to use it for any other than highway purposes, although they did acquire a right to use it for all purposes legitimately connected with the local system of highways. A use for any other than a legitimate highway purpose is a taking within the meaning of the Constitution, inasmuch as it imposes an additional burden upon the land, and whenever land is subject to an additional burden the owner is entitled to additional compensation. The authorities, although not very numerous, are harmonious upon the proposition that laying gas pipes in a suburban road is the imposition of an additional burden, and that compensation must be made to the owner."[134] An injunction will be granted to protect the rights

[132] Consumers', etc., Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640; Consumers', etc., Co. v. Huntsinger, 12 Ind. App. 285; 40 N. E. Rep. 34; Galbreath v. Armour, 4 Bell App. Cases 374.

[133] Huffman v. State, 21 Ind. App. 449; 52 N. E. Rep. 715.

[134] Kincaid v. Indianapolis, etc., Co., 124 Ind. 577; 24 N. E. Rep. 1066; 8 L. R. A. 602; Bloomfield, etc., Co. v. Calkins, 62 N. Y. 386; 1 T. and C. 549; Bloomfield, etc., Co. v. Richardson, 63 Barb. 437; Sterling's Appeal, 116 Pa. St. 35; Webb v. Ohio Gas Fuel Co., 16 Wkly. Law Bull. 121; 9 Ohio Dec. Rep. 662; Biddle v.

of an abutting land owner, even though the soil under the highway is of no actual value to him.[135]

§ 580. Consent of county.— Public highways, crossing.

Where the road is beyond the limits of a city or town, then the consent of the county authorities must be obtained before laying the gas pipes or mains therein. As a rule, the laying of gas pipes in a public highway without consent of the proper authorities is such an act as will lay the individuals doing it liable to an indictment and punishment. "It seems to us," said one court, "that when the Salemonie Gas Company entered upon the lands in question without the consent of the owner of the fee, and without permission of the board of county commissioners, it became a trespasser, and was upon such lands unlawfully."[136] Where a statute gave a natural gas company authority "To dig its trenches, to lay its pipe lines over, across or under any . . . road, highway or railroad, so as to not interfere with the free use of the same, which the route thereof shall intersect, in such manner as to afford security for life or property; and whenever the board of county commissioners of the proper county shall so direct, said trenches and pipe lines may be constructed and laid along the right of way of any road or highway, but in all cases where said trenches or pipe lines shall be laid across, upon or along any general road, or highway thus intersected, said company . . . shall immediately re-

Wayne W. W. Co., 7 Del. Co. Rep. 161; Murray v. Gibson, 21 Ill. App. 488 (a drain); Indiana, etc., R. R. Co. v. Hartley, 67 Ill. 439 (a drain); Board, etc., Co. v. Barnett, 107 Ill. 507 (a drain); Consumers' etc., Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640. See Columbia Conduit Co. v. Commonwealth, 90 Pa. St. 307; Paine v. Calor Oil & Gas Co. (Ky.), 103 S. W. Rep. 309; 31 Ky. L. Rep. 754.

Where an owner of land grants to a pipe line company the right to lay its pipes under his land, the company is not liable for any damages to the owner if it lays its pipes within the limits of the right of way, according to the methods customarily adopted in prosecution of such undertakings, and without negligence. Winnett v. Carnegie Natural Gas Co., 37 Pa. Super. Ct. 204.

[135] Goodson v. Richardson, L. R. 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. (N. S.) 142; 22 W. R. 337; Clippens Oil Co. v. Edinburgh, etc., 25 Rettie 370.

[136] Huffman v. State, 21 Ind. App. 449; 52 N. E. Rep. 713; Consumers', etc., Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640; Hardman v. Cabot, 60 W. Va. 664; 55 S. E. Rep. 756; 7 L. R. A. (N. S.) 506; People v. Cromwell, 89 N. Y. App. Div. 291; 85 N. Y. Supp. Rep. 878.

store the same to its former state," it was held that while the natural gas company could cross a public highway without the consent of the board of county commissioners, it could not lay its pipe lines along it without first obtaining consent from them to do so.[137]

§ 581. Revocation of license to use highway.

Having once granted to a gas company the right to use the rural highway of the county, the county authorities cannot revoke the right if the company has accepted and acted upon it; and in an action to prevent the company from laying its pipes in the highway over which the right was granted to lay pipe lines, the county must not only show facts entitling it to a rescission, that the company had not acted in good faith upon the license granted, and that it was, at the time the suit was instituted, attempting or threatening the use of the highway for the purpose given it in such license.[138]

§ 582. Abutting land owner removing pipe lines.

If pipe lines have been laid in a public highway without the consent of the abutting land owner, and without compensation to him because of the additional burden on the fee, he may remove them; and neither he nor those assisting him will be liable, in the absence or use of unnecessary force or violence.[139]

§ 583. Removal of pipes unlawfully laid in rural highway.

If a gas company lay pipe lines in a rural highway without the consent of the abutting land owner, it may not remove them without his consent. As soon as they are placed in the soil they become a part of the freehold; and their removal by the company lays it liable to an indictment for trespass upon the land in which they are embedded. "It seems to us," said the Appellate Court of Indiana, "that when the Salemonie Gas Com-

[137] Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640; Board v. Indianapolis, etc., Co., 134 Ind. 209; 33 N. E. Rep. 972; Consumers', etc., Co. v. Huntsinger, 12 Ind. App. 285; 40 N. E. Rep. 34.

[138] Board v. Indianapolis, etc., Co., 134 Ind. 209; 33 N. E. Rep. 972.

[139] Consumers', etc., Co. v. Huntsinger, 14 Ind. App. 156; 42 N. E. Rep. 640.

pany entered upon the lands in question without the consent of the owner of the fee, and without permission of the board of county commissioners, it became a trespasser, and was upon such lands unlawfully. If it was unlawful in the first place to go upon the lands to construct the pipe line, without the consent of the owner, it was likewise unlawful to go upon them to remove the same, and hence when appellant was upon the lands of the prosecuting witness, in charge of a force of men engaged in removing such pipe line, he was unlawfully there. While appellant was not himself engaged in the manual removing of the pipe, he was directing and overseeing the work of removal." "Neither a private person nor a corporation has any inherent right so to use a public thoroughfare, and where the proper steps have not been taken to acquire such right, it is a trespass, within the meaning of the statute, so to do. So, when the appellant went upon the land of the prosecuting witness to take up the pipe line, he was there unlawfully; and when he refused to depart, upon being notified to do so, it was a violation of the statute, for which he must answer." [140]

§ 584. Pipes on surface of highway or street.

Whatever may be the right to lay gas pipes in a highway or street, it is clear that none can be acquired to lay the pipes on its surface. A street or highway is for public travel, and not for private purposes. It must be free from obstructions to travel from side to side, from end to end. If pipes are laid on the surface of a street or highway, the company will be liable for all damages occasioned thereby, even though such damages would not have been occasioned by the pipes if they had been buried in trenches.[141] "It is a nuisance and unlawful to place and keep or leave continuously in a public highway anything which either impedes or endangers public travel. This rule applies to the whole width of the highway, and not merely to a worn portion of it commonly used for passage. Privileges

[140] Huffman v. State, 21 Ind. App. 449; 52 N. E. Rep. 713.

[141] Lebanon, etc., Co. v. Leap, 139 Ind. 443; 39 N. E. Rep. 57; 29 L. R. A. 342.

which, if usurped by a greater number of persons or corporations would change the road from a public easement to a mere special benefit or convenience to such usurpers, are not lawful for any of them. The user must be consistent with the continued use of the road every part thereof as a passageway by all persons exercising ordinary care." [142] In the case from which this quotation is made, a half-inch gas pipe, the thickness of the iron being one-eighth of an inch, was laid in the highway four feet from the fence; and it was hid by weeds, and grass that covered it, having laid there several years. A stranger to that neighborhood was taking a traction engine into a field bordering on the highway, and not knowing of the existence of the pipe, ran over it, broke it, and an explosion followed, to his injury. It was held that the company laying the pipe in the highway were liable to recompense him for his injuries. So where a boy eighteen years of age, passing along a highway, stopped to look at burning gas escaping from a pipe laid in such highway, and he was told by another boy with him, that if he would raise up the pipe it would make a nice fire, which he did, and an explosion followed, to his injury, it was held that he could recover, and that he did not so contribute to the explosion so as to bar his right to recover damages.[143]

§ 585. Size of pipes.—Number of pipes.

Unless some statute or ordinance or the grant itself specifies the size of the pipes to be laid in the street, the whole matter is within the control of the gas company. It may lay pipes unnecessarily large for the accommodation of its customers. If it may transmit gas to another municipality, then it may lay pipes in the municipality when it has its plant sufficiently large to carry a sufficient supply to such other municipality.[144]

[142] Indiana, etc., Co. v. McMath, 26 Ind. App. 154; 57 N. E. Rep. 593; 59 N. E. Rep. 287.

[143] Lebanon, etc., Co. v. Leap, *supra*. See Ohio Gas Fuel Co. v. Andrews, 50 Ohio St. 695; 35 N. E. Rep. 1059; 29 L. R. A. 337; United States Natural Gas Co. v. Hicks, 134 Ky. 12; 119 S. W. Rep. 166.

In Pennsylvania the courts under a statute may compel a gas company to put its pipes under ground. Kiskiminetas Tp. v. Coemaugh Gas Co., 14 Pa. Super. Ct. 67.

[144] Public Service Corp. v. De Grote, 70 N. J. Eq. 454; 62 Atl. Rep. 65.

Where a owner granted a gas company the right to lay "lines of pipe" across his land, it was held that the laying of one line did not exhaust its right, and that it could thereafter lay other lines.[145]

§ 586. Pipes interfering with other pipes.

Of course, gas pipes must be so laid as not to interfere with other pipes lawfully laid and maintained in the street. Sometimes a statute specifies how far away from others the pipes must be laid. And where such a statute provided that "all pipes" should be placed at the greatest practicable distance from the nearest part of any water pipes then laid, laid horizontally at least four feet distance from the nearest part of any such pipe, unless unavoidably necessary to lay the gas pipes across or nearer to the water pipe, in which case the gas pipe should be laid under the water pipe at the nearest practicable distance, not less than twelve inches, and should form a right angle, or as near thereto as the situation would admit, and in no instance should any pipe be laid or apparatus be used that would interfere in any way with the supply pipe of any water company, it was held that the term "all pipes" referred only to main or distributing pipes, and that the proximity of a main or distributing pipe to a service pipe was not limited or controlled by the statute, beyond the restriction that it should not interfere with it in the manner described in the statute.[146]

[145] Winnett v. Carnegie Nat. Gas Co., 37 Pa. Super. Ct. Rep. 204.

If, after an owner of land grants to a pipe line company the right to lay lines of pipe on his land, the land changes ownership, and the new owner for a valuable consideration confirms the grant, he cannot prevent the company from laying new lines within the right of way, although he may *never* in fact have *seen the original grant.* Winnett v. Carnegie Natural Gas Co., 37 Pa. Super. Ct. 204.

[146] Atlantic City Gas & W. Co. v. Consumers' Gas & Fuel Co., N. J. Eq. 536; 61 Atl. Rep. 750.

Harlan river is a "public place" within the meaning of a statute giving the right to lay pipes in streets, avenues, squares and public places. Steam Dredge Co. No. 6, 222 Fed. 576.

CHAPTER XXIV.

MUNICIPALITY SUPPLYING GAS.

§ 587. Municipality may be authorized to own gas plant.
§ 588. Sufficiency of statute to authorize municipality to furnish gas for commercial purposes.
§ 589. Insufficiency of statute to authorize a municipality to furnish commercial gas.
§ 590. Construction of municipal charters.
§ 591. Municipality's profit.
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§ 594. Municipality must be sole proprietor of plant.—Taking stock.
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§ 587. Municipality may be authorized to own gas plant.

It is clear that a municipality cannot own a gas plant and supply its inhabitants with gas for lighting, heating or power purposes unless some statute in direct terms, or by very strong implication, authorizes it.[1] It is universally the case that such

[1] Ladd v. Jones, 61 Ill. App. 584. A statute giving the city council power to provide for and regulate the lighting of streets, and to provide for such lights as are necessary for the convenient transaction of public business; and another statute authorizing it to determine what are public uses and when the necessity exists for condemning lands for such use, do not authorize it to maintain works and carry on the business of supplying its inhabitants with light and heat. Hyatt v. Williams, 148 Cal. 585; 84 Pac. Rep. 41; Houma Lighting & Mfg. Co. v. Houma, 127 La. 726; 53 So. 970.

institutions of government are authorized to supply their inhabitants with water; but the practice has not been so universal with reference to light; although the practice is almost daily growing, to extend such power to them. The power of the legislature to authorize a municipality to furnish light for commercial purposes to its inhabitants received a very careful examination by the justices of the Supreme Court of Massachusetts as late as 1890. The constitution of that State authorizes the general court to make "all manner of wholesome and reasonable orders, laws, statutes, and ordinances," and to levy "proportional and reasonable assessments, rates, and taxes, . . . for the public service, in the necessary defense and support of the government of said commonwealth, and the protection and preservation of the subject thereof." Under this power the court was of the opinion, when an opinion was requested of it by the legislature, that it could authorize a municipality to not only buy or purchase a gas or electric lighting plant to light its streets and public buildings; but it could also supply its inhabitants with gas and electricity for private purposes. The opinion, however, is confined to the power to furnish gas or electricity for lighting purposes, and nothing is said concerning the furnishing of these commodities for heating or power.[2] In other States similar opinions have been given.[3] To levy a tax to build a plant and supply gas for lighting the streets, and also for domestic purposes, is to levy one for public purposes; and it cannot be defeated on the ground that it is for a private purpose, or a business in which only a private corpora-

[2] Opinion of the Justices, 150 Mass. 592; 24 N. E. Rep. 1084; 8 L. R. A. 487; Citizens' Gaslight Co. v. Wakefield, 161 Mass. 432; 37 N. E. Rep. 444; Graeff v. Felix, 24 Pa. Co. Ct. Rep. 657.

[3] State v. Hamilton, 47 Ohio St. 52; 23 N. E. Rep. 935; Wheeler v. Philadelphia, 77 Pa. St. 338; Linn v. Chambersburg, 160 Pa. St. 511; 28 Atl. Rep. 842; Hamilton Gaslight and Coke Co. v. Hamilton, 146 U. S. 258; 13 Sup. Ct. Rep. 90; affirming 37 Fed. Rep. 832.

tion is authorized to enter upon. It is the duty of a municipality to light its streets and public places in order to protect the lives and property of its citizens from thieves, robbers and murderers;[4] and it is a necessity that its public buildings should be lighted in order that its business may be properly transacted. But to erect a plant for these purposes would necessarily result in a loss to the municipality unless there is connected with it the power to furnish gas to the private consumer. The business of furnishing gas to a municipality is of such a monopolistic character that if it should undertake to furnish it for municipal purposes alone it would be very often impossible for its inhabitants to secure gas from a private source; for in the average municipality one gas company is sufficient to supply all the gas needed within its boundaries, and two companies cannot operate with a sufficient profit to maintain their plants. If, therefore, a municipality could not supply its inhabitants with gas for domestic purposes they would often, indeed in a very large majority of cases, be entirely deprived of its use. The rule is universal that taxation for the purpose of building gas and electric plants for lighting purposes by municipalities is such a public subject as authorizes taxation for that purpose.[5] In furnishing gas to private consumers a city acts in its capacity as a private corporation and not by virtue of its powers of local sovereignty. In such

[4] Crawfordsville v. Braden, 130 Ind. 149; 28 N. E. Rep. 849; 14 L. R. A. 268; 30 Am. St. Rep. 214.

[5] Fellows v. Walter, 39 Fed. Rep. 651; State v. Toledo, 48 Ohio St. 112; 26 N. E. Rep. 1061; 11 L. R. A. 729; Mitchell v. Negaunee, 113 Mich. 359; 71 N. W. Rep. 646; 38 L. R. A. 157; Townsend Gas, etc., Co. v. Port Townsend, 19 Wash. 407; 53 Pac. Rep. 551; Jacksonville, etc., Co. v. Jacksonville, 36 Fla. 229; 18 So. Rep. 667; 30 L. R. A. 540; Schenck v. Olyphant, 181 Pa. St. 191; 37 Atl. Rep. 258; Cary v. Blodgett, 10 Cal. App. 463; 102 Pac. Rep. 668; Postdam Electric L. & P. Co. v. Potsdam, 49 N. Y. Misc. Rep. 18; 97 N. Y. Supp. Rep. 190; Holton v. Camilla, 134 Ga. 560; 68 S. E. Rep. 472 (ice plant).

a case the municipality is bound by its contracts with its inhabitants, and the legislature cannot authorize it to violate them.[6] The legislature has the power to authorize cities to erect and maintain plants to supply its citizens with light, to be paid for by taxation.[6a]

§ 588. Sufficiency of statute to authorize municipality to furnish gas for commercial purposes.

Where a statute in direct terms authorizes a municipality to furnish gas for commercial purposes, there is no room for construction; but where the power is an implied one difficulties arise. This difficulty is very well illustrated by an Indiana case. In that State a statute gave a city or town "power to light the streets, alleys and other public places of such city or town with the electric light, or other form of light, and to contract with any individual or corporation for lighting such streets, alleys and other public places with the electric light, or other form of light, on such terms, and for such times, not exceeding ten years, as may be agreed upon." Under this statute it was held that a municipality had the power to buy an electric lighting plant, and as an incident to its purchase to

[6] Western Saving Fund Society v. Philadelphia, 31 Pa. St. 175; 72 Am. Dec. 730; Bailey v. Philadelphia, 184 Pa. St. 594; 41 W. N. C. 529; 39 Atl. Rep. 494; 39 L. R. A. 837; Colorado Springs v. Pike's Peak Hydro Electre Co., 57 Colo. 169; 140 Pac. 921; Oakes Mfg. Co. v. New York, 206 N. Y. 221, 749; 99 N. E. 414, 540, affirming 141 App. Div. 130; 125 N. Y. Supp. 1030; Brantman v. Canby, 119 Minn. 396; 138 N. W. 671 (liable for negligence); Greenville v. Branch (Tex. Civ. App.), 152 S. W. 478.

A statute expressly authorizing a city to light its streets and grounds gives it the necessary use of the streets for that purpose. Neary v. Milwaukee, 151 Wis. 504; 139 N. W. 409.

[6a] Colorado Springs v. Pike's Peak Hydro-Electric Co., 57 Colo. 169; 140 Pac. 921.

issue bonds in order to secure money to pay for it. Nothing is said in the opinion concerning the furnishing of commercial light, but it is apparent throughout that the municipality was about to engage upon that enterprise.[7] In a subsequent case the power of a municipality to furnish light to a private consumer for remuneration was directly presented; and its power upheld under the statute quoted. The court considered that "the power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and properties of its inhabitants, and as a check on immorality." "So far as lighting the streets, alleys, and public places, of a municipal corporation is concerned," said the court, "we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless this discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and financial condition of the corporation." In discussing the power to furnish light for commercial purposes, the court added: "The corporation possessing, as it does, the power to generate and distribute throughout its limits, electricity for the lighting of the streets and other public places, we can see no good reason why it may not also, at the same time, furnish it to its inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of the police power for the preservation of property and health."[8] A statute of Iowa gave a municipality power "to establish and maintain gas works or electric light plants, with all the necessary poles, wires, burners, and other requisites of said gas works or electric light plant." Under this statute it was held that it had the power to furnish commercial light. "It has been the uniform rule," said the court, "that a city, in erecting gas works or water works, is not limited to furnishing gas or water for use only upon the streets and other public

[7] Rushville Gas Co. v. Rushville, 121 Ind. 206; 23 N. E. Rep. 72.

[8] Crawfordsville v. Braden, 130 Ind. 149; 28 N. E. Rep. 849; 14 L. R. A. 268; 30 Am. St. Rep. 214; Rockebrandt v. Madison, 9 Ind. App. 227; 36 N. E. Rep. 444.

places of the city, but may furnish the same for private use; and the statutes of Iowa now place electric light plants in the same category." [9] In Tennessee a statute authorized a municipality to provide itself "with water by water works, within or beyond its boundaries, and to provide for the prevention and extinguishment of fires, and organize and establish fire companies." Acting under the authority thus conferred, a city established water works, and in addition to making provision for the extinguishment of fires, it furnished water to the citizens. The action of the city was upheld by the Supreme Court of that State. "Nothing," said the court, "should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants; nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all men can be furnished, in a populous city, only through the instrumentality of a well equipped water works. Hence, for a city to meet such a demand is to perform a public act and confer a public blessing. It is not a strictly governmental or municipal function, which every municipality is under legal obligation to assume and perform, but it is very close akin to it, and should always be recognized as within the scope of its authority, unless excluded by some positive law. . . . It is the doing of an act for the public weal — a lending of corporate property to a public use. . . . It cannot be held that the city, in doing so, is engaged in a private enterprise, or performing a municipal function for a private end." [10] Under an authority to contract and be contracted with, sue and be sued, and do all things for the benefit of the city," a city may construct and maintain a water and light plant or either one.[11] So under a statute authorizing a city to issue bonds for municipal pur-

[9] Thomson-Houston Electric Co. v. Newton, 42 Fed. Rep. 723. The Indiana Supreme Court in the case just cited considered that this statute did not confer any power not included among the implied powers of a municipal corporation.

[10] Smith v. Nashville, 88 Tenn. 464; 12 S. W. Rep. 924; Ellinwood v. Reedsburg, 91 Wis. 131; 64 N. W. Rep. 885; Hummelstown v. Brunner, 17 Pa. Co. Ct. Rep. 140; 5 Pa. Dist. Rep. 8.

[11] Heilbron v. Cuthbert, 96 Ga 312; 23 S. E. 206.

poses a city may issue them to build a plant to light its streets and supply commercial light.[12]

§ 589. Insufficiency of statute to authorize a municipality to furnish commercial gas.

Courts have not always indulged in the liberal interpretation of statutes that has been exhibited in the previous section. In South Carolina the Supreme Court said on a question of this kind: "The city has the express power to own property, and it also has the implied right to light the city. . . . Considering that some discretion as to the mode and manner should be allowed the municipality, in carrying out the conceded power to light the streets of the city, we hold that the purchase of the plant was not *ultra vires* and void, so far as it was designed to produce electricity suitable for and used in lighting the streets and public buildings of the city." The court, however, denied the power of the city to furnish light to private citizens, on the ground that to do so would be entering into private business outside of the scope of the city government.[13] The same conclusion was reached in Massachusetts. The statutes of the State — many in number — are reviewed at length; but it is held that none authorized a municipality to embark in the enterprise of furnishing private citizens light in connection with the light it furnishes for lighting its streets; indeed, it is said that a municipality is under no obligation to light its streets.[14] So in New Jersey a municipality is not authorized to erect and maintain an electric plant by a power to pass ordinances for "lighting the streets"; for another provision requires the council to establish lamp, police and water districts in the city, and directs that the taxes for lighting streets shall be assessed wholly on the property within these districts. This statute also authorizes the city to enter into a

[12] Jacksonville Electric Light Co. v. Jacksonville, 36 Fla. 229; 18 So. Rep. 677; 30 L. R. A. 540; Overall v. Madisonville, 125 Ky. 684; 102 S. W. Rep. 278; 31 Ky. L. Rep. 278.

[13] Mauldin v. Greenville, 33 S. C. 1; 11 S. E. Rep. 434; 8 L. R. A. 291.

[14] Spaulding v. Peabody, 153 Mass. 129; 26 N. E. Rep. 421; 10 L. R. A. 397.

contract for street lights with any party, for a term not exceeding five years, and to annually levy and collect a tax to pay the expense thereof.[15]

§ 590. Construction of municipal charters.

In determining whether or not a municipality may own a gas plant and supply its inhabitants with gas for lighting, heating or power purposes, it must be borne in mind that a municipality has only such powers as the State through its constitution or legislative body has conferred upon it. "They [municipalities] have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant."[16] It is, therefore, a rule of interpretation of the charters of a municipality, or of the laws under which it is

[15] Howell v. Millville, 60 N. J. L. 95; 36 Atl. Rep. 691; Hyatt v. Williams, 148 Cal. 585; 84 Pac. Rep. 41.

The objection that a city has no power to purchase waterworks cannot be made by the owner of the works in order to defeat his contract with the city for the sale thereof. Bristol v. Bristol, etc., W. W., 19 R. I. 413; 34 Atl. Rep. 359; 32 L. R. A. 740.

In North Carolina it was held that furnishing water to the inhabitants of a city was not in itself a necessary city expense in the sense that a city must own and operate a system of waterworks. Charlotte v. Shepard, 120 N. C. 411; 27 S. E. Rep. 109.

In New Jersey it is said that making and selling gas is not a prerogative of government. Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242.

[16] Cooley Const. Lim. (6th ed.) 227; citing Stetson v. Kempton, 13 Mass. 272; Willard v. Killingworth, 8 Conn. 247; Abendroth v. Greenwich, 29 Conn. 356; Baldwin v. North Branford, 32 Conn. 47; Webster v. Harwinton, 32 Conn. 131; Douglass v. Placerville, 18 Cal. 644; Lackland v. North. Mo. R. R. Co., 31 Mo. 180; Mays v. Cincinnati, 1 Ohio St. 268; Frost v. Belmont, 6 Allen 152; Hess v. Pegg, 7 Nev. 23; Ould v. Richmond, 23 Gratt. 464; 14 Am. Rep. 139; Youngblood v. Sexton, 32 Mich. 406; 20 Am. Rep. 654; Detroit Citizens' St. Ry. v. Detroit Ry., 171 U. S. 48; 18 Sup. Ct. Rep. 732; affirming 110 Mich. 384; 68 N. W. Rep. 304.

incorporated, that power not expressly given will not be presumed, unless necessarily or fairly implied in or incident to other powers expressly given — not simply convenient, but indispensable to them.[17]

§ 591. Municipality's profit.

If the avowed purpose of the object of a municipality in furnishing gas is merely a business venture, with a view to make a profit by the undertaking, and not to furnish gas to its inhabitants as cheaply as it can reasonably be done without loss and to obtain lights for its streets, then it may well be doubted if it can engage in such business; for to do so would be to authorize a municipality to engage in purely a commercial adventure. But just where the line shall be drawn in fixing the rates it may charge is difficult to determine. Such a question is an illustration of a theoretical rather than a practical problem. Prudence should dictate to a municipality to fix the rate not only sufficiently high to pay all running expenses, but high enough to furnish a fund for repairing the machinery and other parts of the plant, and, indeed, to create a fund to replace them when they are ultimately worn out, without resorting to the power of taxation to obtain new machinery. To permit the municipality to fix the rate so high that it will not only furnish these several sums, but also make at least a return of a sum sufficient to pay the usual rate of interest on the investment, would be to allow it to engage in a commercial adventure, as clearly so as to allow it to make a greater amount termed "profit."[18] Of course, if a plant is self-sustaining, and the municipality thereby gets its street and own light free of charge (as is usually the case), then an inequality necessarily arises among its inhabitants: for those who use the gas necessarily pay a rate so high that it enables the municipality to supply

[17] Los Angeles v. Los Angeles City Water Co., 177 U. S. 558; 20 Sup. Ct. 736; Detroit Citizens' St. Ry. v. Detroit Ry., 171 U. S. 48; 18 Sup. Ct. Rep. 732; affirming 110 Mich. 384; 68 N. W. Rep. 304; Park Com'rs v. Common Council, 28 Mich. 228, 239.

[18] See Hamilton v. Hamilton, etc., Gaslight Co., 11 Ohio Dec. 513; Dixon v. Entriken, 6 Pa. Dist. Rep. 447; 19 Pa. Co. Ct. Rep. 414.

its streets and its public buildings with light free of cost to itself, while those of its inhabitants who do not use the gas contribute nothing towards the lighting of such streets and public buildings. The inequality may not be very great, and yet it will exist. The author does not recall any instance where this fact of inequality has been urged as a reason why statutes authorizing a municipality to furnish gas, light or water to private consumers are unconstitutional, or such an enterprise unauthorized.[19]

§ 592. Competition with private plant.

As a general rule, a municipality cannot deprive itself, in making a grant to a private company, of the right to furnish light or water, nor bind itself not to erect a plant of its own and not to compete with such company in the furnishing of light and water, where its charter authorizes it to put in a light or water plant.[20] The city may occupy with its mains the same streets the private company is occupying.[21] If a municipality has the authority to take water works under the power of eminent domain, such power is not taken away by a contract with a private company for the supply of water during a term of years having in it a provision requiring the payment of hydrant rentals by such municipality.[22]

§ 593. Election to authorize purchase or erection of plant.

Recent statutes frequently limit the power of a municipality to purchase or erect a lighting plant, by first requiring the question to be submitted to a vote of the inhabitants of the

[19] Water or gas rates are not taxes which may be collected by the tax collector. Dixon v. Entriken, 6 Pa. Dist. Rep. 447; 19 Pa. Co. Ct. Rep. 414.

[20] North Springs Water Co. v. Tacoma, 21 Wash. 517; 58 Pac. Rep. 773; 47 L. R. A. 214. See Walla Walla v. Walla Walla Water Co., 172 U. S. 1; 19 Sup. Ct. Rep. 77; affirming 60 Fed. Rep. 957.

[21] Hughes v. Momence, 163 Ill. 535; 45 N. E. Rep. 300; Water, L. & G. Co. v. Hutchinson, 144 Fed. Rep. 256.

[22] Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685; affirming 143 N. Y. 596; 38 N. E. Rep. 983; 17 Sup. Ct. Rep. 718; 29 Chicago L. N. 313. See North Springs Water Co. v. Tacoma, *supra*.

municipality. Notice of the proposition is required to be given. Sometimes these propositions are voted upon at a general election, in connection with the election of officers, and at other times a special election is held for the sole purpose of taking the sense of the electors upon the propositions submitted to them. Thus a statute of Massachusetts required two affirmative votes, taken at a meeting that is peculiar to the town organizations of that State, before the town could erect a plant; and if the vote should at both meetings be in the affirmative, the town could then erect a plant. It also provided that the town might purchase any existing plant in the town, after such votes had been taken, if the owner of it consented to sell it and they could agree on terms; but if the city declined to purchase, then the owner could apply to the court for the appointment of commissioners to fix the value of his plant, and the town was then compelled to take it at the figures thus fixed. Under this statute it was decided that a third vote to buy an existing plant was not necessary; that the fact of the poles of the plant not being legally in the streets would not defeat the petition of the owner, that fact going only to reduce the value of the plant; and that that portion of the statute requiring the town to purchase the plant was constitutional, it being optional with the owner to sell.[23] Slight variations among the separate instruments calling for an election, the notice of election and the like do not invalidate the proceedings. But a proceeding for the building of a plant is invalidated by the fact that the resolution adopted stated that bonds would be issued "for the erection and purchase," the mayor's proclamation being that it was "for the erection," and the ordinance that it was "for the erection or construction" of a plant. Such a double purpose is such as to invalidate the proceedings.[24] A city may issue bonds for a water plant alone under a charter provision by separate provisions to be voted on, for the issuing of bonds for

[23] Citizens' Gaslight Co. v. Wakefield, 161 Mass. 432; 37 N. E. Rep. 444. See Baltimore, etc., Co. v. People, 200 Ill. 623; 66 N. E. Rep. 246.

[24] Elyria Gas, etc., Co. v. Elyria, 57 Ohio St. 374; 49 N. E. Rep. 335, reversing 14 Ohio C. C. 219; 7 Ohio Dec. 527; 38 Wkly. L. Bull. 200; 39 Wkly. L. Bull. 139.

building one kind of a plant without building the other also, although they are called "water and light bonds" in the charter.[25] Of course the power to issue bonds or borrow money to build or purchase a plant is subject to constitutional limitations concerning indebtedness. Where a statute requires a vote to be first taken to determine whether a lighting system shall be acquired by the municipality, the municipal authorities cannot waive a compliance with the provisions of the statute; for the sanction of the vote is a condition precedent to the right of the municipality to institute condemnatory proceedings, when necessary, to acquire property for the plant.[27] So power whereby a lighting undertaking may be authorized by a provisional order of a municipality to purchase such undertaking compulsorily on issuing corporation stock to a certain amount is in abeyance so long as the municipality has no power to issue irredeemable stock because of a subsequent provisional order taking away the power previously held, but not exercised by the municipality, although the statutes confirming the two orders were approved on the same day.[28]

§ 594. Municipality sole proprietor of plant.—Taking stock.

Whether or not a municipality must be the sole owner of a gas plant, or whether it may embark in the enterprise in connection with private funds, depends upon the state constitution and statutes of the State. In some States their constitutions forbid a municipality to become a stockholder in any stock company, corporation, or association, or even to raise money for or loan its credit to or in aid of any such company, corporation, or association. Such a provision is sufficient to prohibit from becoming a part owner of a gas plant, the remaining portion being held by private individuals. Such a provision is broad enough to forbid additions to the works of

[25] Janeway v. Duluth, 65 Minn. 292; 68 N. W. Rep. 24.

[26] Spilman v. Parkersburg, 35 W. Va. 605; 14 S. E. Rep. 279.

[27] *In re* LeRoy, 23 N. Y. Misc. 53; 50 N. Y. Supp. 611.

In New York a plant to light private buildings cannot be erected by a city until a favorable vote has been taken of the city's electorate and the permission of the State Gas Commission obtained. Pottsdam Electric L. & P. Co., 49 Misc. Rep. 18; 97 N. Y. Supp. Rep. 190.

[28] Sheffield v. Sheffield, etc., Co. [1898], 1 Ch. 203; 77 Law T. Rep. 616; 67 L. J. Ch. (N. S.) 113.

the municipality made by private capital, with a view of leasing such additions to it.[29] But if no provision of the constitution prohibit the investment, a statute may provide that a municipality may take stock in a company organized to furnish light to a city and its inhabitants.[30] A statute forbidding a municipality to make any subscription to the capital stock of an incorporated company or loan its credit for the benefit of such company, is not violated by an agreement in a water contract to pay the hydrant rentals to the bondholders of the companying supplying the water.[31]

§ 595. Right to purchase plant of gas company.

Statutes frequently authorize a municipality to bind itself to purchase the plant of a gas company at the end of a term of years during which it supplies it with light;[32] and without such an express statute there is nothing objectionable to such a contract. It simply authorizes the purchase of a plant already in existence, instead of the municipality undertaking to build a plant of its own.[33]

[29] Ampt v. Cincinnati, 56 Ohio St. 47; 37 Wkly. L. Bull. 161; 46 N. E. Rep. 69; 35 L. R. A. 737; modifying 12 Ohio C. C. 119; 1 Ohio C. D. 356.

[30] See Marlborough Gaslight Co. v. Neal, 166 Mass. 217; 44 N. E. Rep. 139; Memphis v. Memphis Gayoso Gas Co., 9 Heisk. 531.

[31] State v. Great Falls, 19 Mont. 518; 49 Pac. Rep. 15.

A city may be authorized to take bonds in a gas company. New Orleans v. Clark, 95 U. S. 644. In England, it may issue stock to establish a lighting plant. Sheffield v. Sheffield Electric Light Co. [1898], 1 Ch. 203; 77 L. T. Rep. 616; 67 L. J. Ch. (N. S.) 113.

[32] Neosho City Water Co. v. Neosho, 136 Mo. 498; 38 S. W. Rep. 89.

[33] See Wheeling Gas Co. v. Wheeling, 8 W. Va. 320.

If the price to be paid by the city is to be fixed by arbitrators, part chosen by the city and part by the gas company, and the former choose its arbitrators and notify the company; and the gas company refuse to select any, the city's remedy is to apply for a writ of mandamus to compel it to select its arbitrators, and not a suit in equity to enforce a sale at the price fixed by the city's arbitrators. St. Louis v. St. Louis Gaslight Co., 70 Mo. 69.

Where a municipality had the power to purchase certain gas works, and certain moneys were to be raised for this and other purposes, an injunction to restrain the municipality from opposing a bill promoted by the gas company to extend its works was refused, on the ground that such extension might prevent the municipality from purchasing the works, by exceeding in

value the sum allotted to the municipality by its act for expenditure for this and other purposes. Attorney General v. Mayor of St. Helens, W. N. (1870) 150.

By an agreement made between a gas company and a district council, in whose district the company were in fact supplying gas, although the district was not within their statutory limits of supply, it was agreed that the company should sell and the council should purchase the works, pipes, mains, meters, and other gas apparatus, and all other real and personal property (if any), and all effects of the company laid down or situate within the district, freed and discharged (as between the company and the council) from all debts, outgoings and liabilities, and all easements, rights, powers and privileges (if any) enjoyed or exercisable by the company at a price to be fixed in default of agreement by arbitration; and it was further agreed that "in the case of arbitration and in the event of the council not continuing to take a supply of gas in bulk from the company," the arbitrator, in fixing the purchase price should take into consideration the value of apparatus provided by the company outside the district for the purpose of supplying gas within the district which by reason of the sale would be rendered useless to the company. By a second agreement of even date, terminable on twelve months' notice, the council agreed to take a supply of gas in bulk from the company. It was held that according to the first agreement the purchase money was to be assessed on the basis that the sale was a sale of a portion of a gas plant undertaking as a going concern, and not a mere sale of apparatus *in situ;* and that, in fixing the purchase price, the value of the apparatus provided outside the district for supplying gas within the district was to be taken into consideration by the arbitrator, as the words "in the event of the council not continuing to take a supply of gas in bulk from the company" referred to a contingent loss of the council as customers of the company, which the arbitrator was bound to consider. *In re* Hucknall, etc., Gas Co., 3 L. G. R. 704; 69 J. P. 329.

An agreement by a company organized under a statute providing for the organization of companies for supplying natural gas to consumers in a franchise contract with the city, giving the city an option to purchase all of its property, is beyond its powers and void, and since its performance by the company would at once incapacitate it from performing the statutory duties for which it was chartered, and, being in violation of the declared public policy of the state, it is not estopped by its acceptance and use of the franchise from asserting the invalidity of the agreement; nor is such contract, invalid when made, rendered valid and enforceable by the fact that when it is sought to be enforced natural gas has failed in the locality where the company has its wells. Quimby v. Consumers' Gas Trust Co., 140 F. 362.

By Section 4 of the Burslem Local Board Act, 1877, it was provided that the limits of the Act should comprise and include the whole of the parish of Burslem and the township of Wotstanton. The Burslem

Corporation acquired the right under that Act to supply gas subject to a proviso that as future sanitary authority for the township of Wolstanton might apply for Parliamentary powers to supply their district with gas. By the Wolstanton United Urban Council Gas Act, 1906, it was provided that the Burslem Corporation should sell and the district should purchase all mains, pipes, and other works of the corporation, and for the completion of such purchase all the rights and powers of the corporation as to the supply of gas should cease and determine; such sale and purchase to be "for such price and consideration . . . and on such terms and conditions as may be agreed upon between the Burslem Corporation and the council . . . or failing, such agreement as shall be determined . . . in accordance with the provisions of the English Lords Clauses Act with reference to the taking of lands otherwise than by agreement, and in the construction of the said provisions the expression . . . 'lands' shall mean the mains, pipes and other works aforesaid of the Burslem Corporation," It was held that the Burslem Corporation were not entitled to compensation in respect of severance of the mains, pipes, etc., or in respect of loss of revenue by reason of the fact that their rights and powers to supply gas had ceased and determined. *In re* Wolstanton Urban Council, etc., 72 J. P. 28; 6 L. R. G. 523.

In England where mains and pipes have been laid by a gas company under a road and a tramway is subsequently laid on the surface of such road, the additional expense of the repairs, alteration, removal, or renewal of those mains and pipes caused to the gas company by reason of the existence of the tramway, must, under Section 22 of the Tramways Act, 1870, be borne by the tramway company, even though the work done by the gas company in such repair, etc., does not cause an interruption of the tramway traffic. But the additional expense caused to the gas company by reason of the existence of the tramway in the laying down for the first time since the construction of the tramway of a new service pipe and connecting it with the main laid prior to the construction of the tramway, and also the additional expense caused in the repairs, alteration, or removal of such service pipe cannot be recovered from the tramway company except to the extent of the work done on the mains—for example, the drilling of a hole therein, in order to connect the new service pipe. The expression "work whereby the traffic on the tramway will be interrupted," continued in the Act, does not necessarily involve a complete cessation of the tramway traffic. The slowing down or stoppage of the tram cars to enable the workmen of a gas company to get out of the trenches under or near the tram lines where they are at work in repairing mains or pipes is "interruption" of the tramway traffic within the meaning of the clause. Bristol Gas Co. v. Bristol Tramways, etc., Co., 78 L. J. K. B. 772; [1909] 2 K. B. 297; 100 L. T. 909; 73 J. P. 323; 7 L. G. R. 693; affirmed 54 Sol. Jr. 47; 26 T. L. R 75. As to valuation of plant, see Perth Gas Co. v. Perth, 80 L. J. P. C. 168; [1911] A. C. 506; 105 L. T. 266; 27 T. L. R. 526.

§ 596. Trustees for gas works.

Occasionally trustees are appointed to manage gas works where they are conducted by a municipality. This was the case with the Philadelphia gas plant. That plant was owned by private individuals, and was taken possession of by that city. The stock was replaced by certificates issued by the city to the stockholders according to their several holdings, and trustees were selected and given full control of the works and their management; and they were to create a fund to pay off these certificates and the indebtedness. After these trustees had taken charge, an ordinance was passed by the common council appointing a chief engineer, who was by it put at the head of the gas department of the city; and all moneys collected for gas furnished was to be paid to such officers as he should select. Creditors objected to the engineer taking possession, and to his interfering with the trustees' control of the gas works; and the court upheld them in their objection, and issued an order restraining them. They were entitled, so the court held, to an injunction on the ground that there was such a contract between the city and the creditors as a court of equity would protect; and that when it entered upon such an enterprise it was acting in its capacity as a private corporation, and not in its legislative capacity.[34] These trustees are generally subject to the control of the municipality, and have only such powers as its common council or legislative body may bestow upon them. An instance of their limited power is found in an Ohio case. In that State a statute provided for a board of trustees to manage the municipality's gas plant; and also empowered them to "prescribe by bylaws the price of gas and coke, under such rules and regulations as by ordinance the council may prescribe." The board in the absence of such an

[34] Western Saving Fund Society v. Philadelphia, 31 Pa. St. 175; 72 Am. Dec. 730. See Bailey v. Philadelphia, 184 Pa. St. 594; 41 W. N. C. 529; 39 Atl. Rep. 494; 39 L. R. A. 837; 63 Am. St. 812 (affirming 6 Pa. Dist. Rep. 727; 20 Pa. Co. Ct. 173, where a lease of these works was upheld).

ordinance undertook to fix the price of gas, over the objection of the gas company; and their action was held void.[35] In this State it is also held that so long as an ordinance is in force creating a board of officers to manage the city's gas plant, the council cannot take upon itself the management, through its employees, of its electric lighting plant.[36] The statute referred to in the foregoing sentence authorized the common council to create and appoint a board of trustees, when it had determined to build a lighting plant, to construct the works, and to manage them when they should have been built. The board could not only construct the works, but extend gas pipes, manufacture and sell gas and coke, collect gas bills and other moneys due for gas, coke or other material sold by it, having power to purchase material, employ laborers, appoint officers, purchase or lease the necessary real estate and erect buildings upon it. All money collected for gas works purposes had to be deposited weekly, by its collectors, with the treasurer of the municipality, and be kept as a separate and distinct fund, subject to the order of the board. This money, as well as that levied by the municipality for the gas works, was to be disbursed by the board of trustees. It was held that the board of trustees did not have power, under this statute, to charge the municipality with a general liability on account of machinery or appliances purchased by them for the works under their control; and that they had no authority to control the funds thus placed in their hands independent of the council, because of another statute which provided that "no contract, agreement or other obligations, involving the expenditure of money shall be entered into,

[35] Foster v. Findlay, 5 Ohio Cir. Ct. Rep. 455; 3 Ohio Cir. Dec. 224. See Bellaire Goblet Co. v. Findlay, 5 Ohio Cir. Ct. 418; 3 Ohio Cir. Dec. 205.

[36] Shaw v. Jones, 6 Ohio Dec. 453; 4 Ohio N. P. 372.

In a case involving the Philadelphia gas trustees' power, it was held that they were not required to advertise for bids for coal and let it to the lowest bidder as the city did when it purchased supplies, for the reason that the gas works were not a department of the city government within the provision of the Act of May 13, 1856, requiring the city to advertise for bids and let out the supply of materials to the lowest bidder. Hacker v. Philadelphia, 6 Phila. 94.

nor shall any ordinance, resolution or order for the appropriation or expenditure of money be passed by the city council or by any board or officers of a municipal corporation" unless the city auditor or clerk, "shall first certify that money required for the contract . . . or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose."[37] A statute of this same State provides that no municipal officer until one year after his office has expired, shall be either directly or indirectly interested in the work of his city. Under this statute one of the gas trustees cannot be employed by the others until the end of such year, to supervise the property of the city in the territory where the gas is obtained and where the leased lands of the city are located, or manage its works.[38]

§ 597. Sale of municipal plant.

A municipality usually has the power to sell its lighting plant; but this power is usually given under the statutes authorizing it to dispose of its property generally. Thus a statute empowered a municipality "to acquire by purchase or otherwise and hold real estate, or any interest therein, and other property for the use of the corporation, and to sell or lease the same," and it was held that under this clause it might sell its gas plant, the court saying that the statute "clearly gives the city the power to make such sale whenever, in the judgment of the officers of the city, it becomes for the best interests of such city."[39] In a sale of its plant, as a part of the consideration, the municipality may bind itself to pay such a greater sum per light as will be equal to the taxes to be paid by the company, even in the event that such municipality had no right to exempt the purchasing company from taxation.[40] A provision

[37] Kerr v. Bellefontaine, 59 Ohio St. 446; 52 N. E. Rep. 1024.

[38] Findlay v. Parker, 17 Ohio C. C. 294; 9 Ohio Cir. Dec. 710.

[39] Thompson v. Nemeyer, 59 Ohio St. 486; 52 N. E. Rep. 1024; Kerlin Bros. Co. v. Toledo, 20 Ohio C. C. 603; 8 Ohio N. P. 62.

[40] Frankfort v. Capitol City, etc., Co., 16 Ky. L. Rep. 780; 29 S. W. Rep. 855.

in the contract of sale to the effect that the company shall fulfill its contract to furnish gas to the extent that such contracts can be fulfilled, the purchaser must make all necessary connections for the furnishing of gas which were customarily made.[41]

§ 598. Municipality may lease its own gas works.

A city owning its gas works may sell, lease, or altogether abandon them; and the lease is not an interference with the executive functions of its board of public works which has their direction, control and administration. In the execution of such a lease there is no delegation of any municipal power, legislative or otherwise, which involves a municipal duty. In the ownership and control of gas works a city acts in a business capacity only; and the inability of its common council to bind the discretion of its successors for a term of years, in respect to municipal or governmental function, is not involved in the granting of the lease. In such a lease the municipality may bind itself that it will not in any way interfere with, restrict, limit or imperil the exclusive right vested in the lessee by the lease where the municipality had the sole right and was the only company supplying gas in the municipality; and such a lease does not create a monopoly against public policy where the franchise of the lessee is derived from the State, and not from the municipality, and it merely makes the privilege exclusive so far as the municipality is concerned.[42] The lease by the council of the city's gas works for a definite period —

[41] Pittsburg Carbon Co. v. Philadelphia, 130 Pa. St. 438; 18 Atl. Rep. 732.

[42] Bailey v. Philadelphia, 184 Pa. St. 594; 41 W. N. C. 529; 39 Atl. Rep. 494; 39 L. R. A. 837; 63 Am. St. Rep. 812; affirming 6 Pa. Dist. Rep. 727; 20 Pa. Co. Ct. 173. In the lower court it was also held that the discretion given to a city council to lease the city's gas works invested them with power to lay more stress upon the responsibility of an applicant for a lease than upon the amount of his bid; and that the holders of the gas lease had no standing to enjoin the lease of the gas works; for the promise of the city to apply a certain per cent. of the receipts from the works to the singing fund created for the payment of the bonds was only a promise, and of no greater sanctity than the promise to pay the bonds at maturity.

as twenty years — does not necessarily constitute a suspension of the legislative power of succeeding councils, and is not for that reason void.[43] The city may bind itself not to again engage in the manufacture and sale of gas so long as the lease continues.[44]

§ 599. Rules and regulations.

When a municipality engages in supplying gas to private consumers, it may adopt rules and regulations for supplying such gas, the same as a private company; and the legislature may authorize the board of trustees or commissioners to do so;[45] and no doubt the common council may also adopt,[46] or authorize such board to adopt all necessary and reasonable rules for that purpose. For non-payment of bills, or for abuse in its use or violation of proper rules the supply may be cut off.[47] It may provide by ordinance that where the gas is shut off for failure to pay gas bills, it shall not be turned on again until such bills are paid with the penalty that may be due and all expenses of turning it off.[48] A municipality can no more discriminate between consumers than a private company.[49]

[43] Higgins v. San Diego, 118 Cal. 524; 45 Pac. Rep. 824; 50 Pac. Rep. 670; Newport v. Newport Light Co., 84 Ky. 166.

[44] Bailey v. Philadelphia, *supra*.

[45] Brass v. Rathbone, 153 N. Y. 435; 47 N. E. Rep. 905; affirming 40 N. Y. Supp. 466; 8 App. Div. 78.

[46] Altoona v. Shellenberger, 6 Pa. Dis. Rep. 544.

[47] Brass v. Rathbone, *supra*. Altoona v. Shellenberger, *supra*.

[48] Altoona v. Shellenberger, *supra*.

[49] Rierker v. Lancaster, 14 Lanc. L. Rev. 393.

CHAPTER XXV.

THE GAS COMPANY AND CONSUMER.

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§ 600. No requirement at common law to furnish gas.

At common law no obligation, it has been held, rests upon a company to supply either the municipality or an individual with gas; and this is the result of the early decisions in this country and England. The right to have gas delivered by a gas company was placed purely upon contract; and aside from a contract it was considered that no obligation rested upon the

company to furnish it. A gas company was regarded as a purely private concern, being neither a public or quasi-public corporation. It was regarded the same as if it were an individual—a person—who owned a gas plant and manufactured gas.[1] And the fact that the company's pipes occupied the street in the front of an abutting land owner's property did not impose upon it a duty to supply such land owner with gas. "No duty is imposed upon them," said the Supreme Court of Massachusetts, "nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to any one, either for public or private use or consumption. It is entirely at their option whether they will exercise their corporate rights and privileges at all; and if they undertake to manufacture and dispose of gas, the extent to which they shall carry on the business is left to their own election. Nor is any power conferred on them to take private property, not previously appropriated to a public use, for the purpose of exercising and enjoying their franchise. The only right or privilege given to them is to dig up public streets and ways for the purpose of laying down their mains or pipes."[2] So in New Jersey "power and authority to manufacture, make and sell gas for the purpose of lighting the streets, buildings and manufactories and other places situate in" a certain town was held to be merely permission; and the company could refuse to supply a resident of the town, although it at the time was supplying some of the inhabitants of such town.[3] And even though a company has begun to supply a customer gas, who has his premises all fitted up with gas pipes and fixtures to receive the gas, it may discontinue the supply of gas at any time unless it is under a contract to supply it,[4] even though he, by such dis-

[1] See Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242.

[2] Commonwealth v. Lowell Gaslight Co., 12 Allen 75.

[3] Patterson Gaslight Co. v. Brady, 27 N. J. L. 245; 72 Am. Dec. 360. See now Olmstead v. Morris Aqueduct, 47 N. J. L. 311.

[4] McCune v. Norwich City Gas Co., 30 Conn. 521; 79 Am. Dec. 278.

continuance, will suffer more than nominal damages..[5] Nor does the fact of quarterly payments or the hiring of a meter by the year, or of the company being the only one in the neighborhood furnishing gas, afford any ground for implying a contract to furnish gas;[6] nor even where the company holds a deposit to secure payment for gas used.[7]

§ 601. Company must supply gas.

But the better line of authority, and the more recent cases, aside from any statute, ordinance or contract expressly requiring it, hold that gas companies must supply those whose property abutts upon their lines and that the duty rises from the character of such institutions, they being quasi-public corporations and occupying the streets and public highways.[8] "A natural gas company," said the Supreme Court of Indiana, "occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own or occupy the house abutting on such street, where such owners or occupiers make the necessary arrangements to receive it and comply with the reasonable regulations of such company, such gas as they may require, and that where it refuses or neglects to perform such duty, it may be compelled to do so by writ of mandamus."[9] It is especially true such companies are under a duty to supply persons whose property abutts on their lines, where they have an exclusive grant or monopoly of the supplying of gas in that

[5] Pudsey Coal Gas Co. v. Bradford, L. R. 15 Eq. 167; 21 W. R. 286; 42 L. J. Ch. 293; 22 Gas J. 54; Commonwealth v. Wilkes-Barre Gas Co., 2 Kulp (Pa.) 499.

[6] Hoddesdon Gas and Coke Co. v. Haselwood, 6 C. B. (N. S.) 239; 5 Jur. (N. S.) 1013; 28 L. J. C. P. 268; 7 W. R. 415; 8 Gas J. 261.

[7] Houlgate v. Surrey Consumers' Gas Co., 8 Gas J. 261.

[8] Commercial Bank v. London Gas Co., 20 Up. Can. Q. B. 233; Williams v. Mutual Gas Co., 52 Mich. 499; 50 Am. Rep. 266; 18 N. W. Rep. 236; 4 Am. and Eng. Corp. Cas. 66.

[9] Portland Natural Gas Co. v. State, 135 Ind. 54; 34 N. E. Rep. 818; 21 L. R. A. 639; Spratt v. South Metropolitan Gas Co., 7 Gas J. 663; Baltimore Gaslight Co. v. Colliday, 25 Md. 1; Indiana, etc., Gas Co. v. State, 158 Ind. 516; 63 N. E. Rep. 220; 57 L. R. A. 761; Jordeson v. Sutton, etc., Co., 67 L. J. Ch. 666; [1898] 2 Ch. 614; 79 L. T. 478; 47 W. R. 222; 63 J. P. 137; affirmed 68 L. J. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692; People v. Chicago Gas Trust Co., 130 Ill. 268; 22 N. E. Rep. 798; 8 L. R. A. 497.

municipality;[10] or the right of eminent domain to secure a right of way for their pipe lines.[11] In many instances the duty to furnish the inhabitants of a municipality with gas is en-

[10] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; 6 Sup. Ct. Rep. 252; People v. Manhattan Gas Co., 45 Barb. 136; 1 Abb. Pr. (N. S.) 404; 30 How Pr. 87; Shepherd v. Milwaukee Gaslight Co., 11 Wis. 234; 15 Wis. 318; 82 Am. Dec. 679; 6 Wis. 539; Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983; 42 S. W. Rep. 351; Brunswick Gaslight Co. v. U. S., etc., Co., 85 Me. 532; 27 Atl. Rep. 525; 35 Am. St. Rep. 385; 43 Am. and Eng. Corp. Cas. 459; St. Louis v. St. Louis Gaslight Co., 70 Mo. 69; Shephard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479; Indiana, etc., Co. v. State, 158 Ind. 516; 63 N. E. Rep. 220; 57 L. R. A. 761.

[11] Coy v. Indianapolis Gas Co., 146 Ind. 655; 46 N. E. Rep. 17; 36 L. R. A. 535; 8 Amer. and Eng. Corp. Cas. (N. S.) 771; Gibbs v. Consolidated Gas Co., 130 U. S. 396; 9 Sup. Ct. Rep. 953; State v. Consumers' Gas Trust Co., 157 Ind. 345; 61 N. E. Rep. 674; 55 L. R. A. 245; Hangen v. Albina, etc., Co., 21 Ore. 411; 28 Pac. Rep. 244; 14 L. R. A. 424; Crumley v. Watauga Water Co., 99 Tenn. 420; 41 S. W. Rep. 1058; American, etc., Co. v. State, 46 Neb. 194; 64 N. W. Rep. 711; 30 L. R. A. 447; State v. Butte City Water Co., 18 Mont. 199; 44 Pac. Rep. 966; 32 L. R. A. 697; 56 Am. St. Rep. 574; 4 Am. and Eng. Corp. Cas. (N. S.) 238; Hoehle v. Allegheny Heating Co., 5 Pa. Super. Ct. 21; New York Central, etc., R. R. v. Metropolitan Gaslight Co., 5 Hun 201; Morey v. Metropolitan Gaslight Co., 38 N. Y. Super. Ct. 185; Schmeer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653; 70 N. Y. St. Rep. 92; Woodburn v. Auburn, 87 Me. 287; 32 Atl. Rep. 906; Mackin v. Portland Gas Co., 38 Ore. 120; 61 Pac. Rep. 134 (rehearing denied, 62 Pac. Rep. 20); 49 L. R. A. 596; Watauga Water Co. v. Wolfe, 99 Tenn. 429; 41 S. W. Rep. 1060; Graves v. Key City Gas Co., 93 Ia. 470; 61 N. W. Rep. 937; Griffin v. Goldsboro Water Co., 122 N. C. 206; 30 S. E. Rep. 319; 41 L. R. A. 240; Crescent Steel Co. v. Equitable Gas Co., 23 Pittsb. Leg. J. (N. S.) 316; Bath Gaslight Co. v. Claffey, 74 Hun 638; 26 N. Y. Supp. 287; Noblesville v. Noblesville Gas, etc., Co., 157 Ind. 162; 60 N. E. Rep. 1032; People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406; Cincinnati, etc., Co. v. Bowling Green, 57 Ohio St. 336; 49 N. E. Rep. 121; People v. N. York, etc., Co., 56 N. Y. Supp. 364; New Orleans, etc., Co. v. Paulding, 12 Rob. (La.) 378; Jenkins v. Columbia, etc., Co., 13 Wash. 502; 43 Pac. Rep. 328; Bailey v. Fayette Gas Fuel Co., 193 Pa. St. 175; 44 Atl. Rep. 251; 44 W. N. C. 505; Gallagher v. Equitable Gaslight Co., 141 Cal. 699; 75 Pac. Rep. 329; Public Service Corp. v. American Lighting Co., 67 N. J. L. 122; 57 Atl. Rep. 482; Charleston Nat. Gas Co. v. Low, 52 W. Va. 662; 44 S. E. Rep. 410; Miller v. Wilkesbarre Gas Co., 206 Pa. 254; 55 Atl. Rep. 974; Indiana Nat. Gas & Oil Co. v. State, 162 Ind. 690; 71 N. E. Rep. 133; Wiemer v Louisville Water Co., 130 Fed Rep. 251; Seymour

forced by statute or by ordinance.[12] It is the duty of a gas company to furnish gas to a customer even though he is furnished gas by another company. It is the customer's privilege to quit the other company if he sees fit; or to take from both of them.[13] Even in England where formerly it was held that no obligation rested upon a company to furnish gas; yet if the company had entered into a contract to furnish it and failed to do so, it was liable in damages.[14] A gas company cannot refuse to furnish a married woman with gas for her own build-

Water Co. v. Seymour, 163 Ind. 120; 70 N. E. Rep. 514; State v. Connersville Nat. Gas Co., 163 Ind. 563; 71 N. E. Rep. 483; Johnson v. Atlantic City Gas & W. Co., 65 N. J. Eq. 129; 56 Atl. Rep. 550; Kentucky Heating Co. v. Hood, 133 Ky. 383; 118 S. W. Rep. 337; Vanderberg v. Kansas City Gas Co., 126 Mo. App. 600; 105 S. W. Rep. 17; Cloverdale Homes v. Cloverdale, 182 Ala. 419; 62 So. 712; Public Service Gas Co. v. Newark, 89 N. J. Ch. 384; 98 Atl. 404.

[12] Jones v. Rochester Gas, etc., Co., 7 N. Y. App. Div. 465; 39 N. Y. Supp. 1105; Ferguson v. Metropolitan, etc., Co., 37 How. Pr. 189; Morey v. Metropolitan Gaslight Co., 38 N. Y. Supr. 185; Pearson v. Phoenix Gas Co., 12 Gas. J. 69; Commercial Gas Co. v. Scott, L. R. 10 Q. B. 400; 25 Gas J. 889; Smith v. Capitol Gas Co., 132 Cal. 209; 64 Pac. Rep. 258; Baker v. San Francisco Gas & El. Co., 141 Cal. 710; 75 Pac. Rep. 342; Shelley v. Westchester Lighting Co., 128 N. Y. App. Div. 890; 112 N. Y. Supp. 1146; reversing 55 N. Y. Misc. Rep. 105; 105 N. Y. Supp. 133; Ft. Smith L. & T. Co. v. Kelley, 94 Ark. 461; 127 S. W. Rep. 975; State v. Seattle Lighting Co., 60 Wash. 81; 110 Pac. Rep. 799.

[13] Portland Natural Gas Co. v. State, 135 Ind. 54; 35 N. E. Rep. 818; 21 L. R. A. 639.

[14] Whitehouse v. Liverpool, etc., Co., 5 C. B. 798; 5 M. Gr. and S. 798.

In Commonwealth v. Wilkes-Barre Gas Co., 2 Kulp. 499, it is said that the duty of a gas company to supply all persons of a municipality with gas cannot be inferred like the duty of a common carrier, from the fact that it is engaged in business; the duty arises only from the charter.

The assignee of a gas company's right to furnish gas is bound by the original grant of the privilege of supplying the municipality with gas. Freeport School District v. Enterprise Natural Gas Co., 18 Pa. Super. Ct. 73.

A company cannot escape its duty to supply gas by assigning its franchise. Bath Gaslight Co. v. Clafey, 74 Hun 638; 26 N. Y. Supp. 287.

In a contract to take gas at a certain price, it is not necessary that the gas company agree to furnish gas, as the law requires it to furnish gas. Gallagher v. Equitable Gaslight Co., 141 Cal. 699; 75 Pac. Rep. 329.

ings nor for one she has rented, although her husband lives in it with her.[14a]

§ 602. No discriminations.

Not only is it the duty of a gas company to furnish gas, but it is its duty to treat all alike. It cannot discriminate between customers either in prices or in imposing upon them regulations not applicable to all of their customers under the same circumstances. It must furnish gas without preference or partiality, whether that duty be imposed by statute or not.[15]

[14a] Vanderberg v. Kansas City Gas Co., 126 Mo. 600; 105 S. W. Rep. 17.

Defendants contracted to use natural gas from plaintiff's wells for a specified time, at specified prices, the contract providing that, if by reason of fire, explosion, or other cause, defendants' factory should be closed down, the plaintiffs might, during the time, dispose of gas elsewhere, and, if the non-use extended over a month, plaintiffs should have the right to cancel the contract; it was held that the words "other cause" following "fire and explosion" should be construed to mean other cause similar to fire or explosion, under the rule of *ejusdem generis*, and therefore did not entitle plaintiff to payment to shut down his factory for any cause whatsoever without a liability for breach of such contract. Hickman v. Cabot, 183 Fed. Rep. 747.

[15] Bailey v. Fayette Gas Fuel Co., 193 Pa. St. 175; 44 Atl. Rep. 251; 44 W. N. C. 505; Coy v. Indianapolis Gas Co., 146 Ind. 655; 46 N. E. Rep. 17; 36 L. R. A. 535; 8 Am. and Eng. Corp. Cas. (N. S.) 771; Louisville Gas Co. v. Dulaney, 100 Ky. 405; 38 S. W. Rep. 703; 36 L. R. A. 125; 6 Am. and Eng. Corp. Cas. (N. S.) 241; Jones v. Rochester Gas, etc., Co., 7 N. Y. App. Div. 465; 39 N. Y. Supp. 1105; New Orleans Gaslight, etc., Co. v. Paulding, 12 Rob. (La.) 378; Portland Natural Gas Co. v. State, 135 Ind. 54; 35 N. E. Rep. 818; 21 L. R. A. 639; Harbison v. Knoxville Water Co., 103 Tenn. 421; 53 S. W. Rep. 993; Cincinnati, etc., Co. v. Bowling Green, 57 Ohio St. 336; 49 N. E. Rep. 121; People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406; Vanderberg v. Kansas City Gas Co., 126 Mo. App. 600; 105 S. W. Rep. 17; Phelan v. Boone Gas Co., 147 Iowa 626; 125 N. W. Rep. 208; State v. Board, 105 Minn. 427; 117 N. W. Rep. 827; United Fuel Gas Co. v. Public Service Commission, 73 W. Va. 571; 80 S. W. 931; Leisenring v. Pennsylvania Light Co., 59 Pa. Super. Ct. 202; Egyptian Packing Co. v. Olney Gas Co., 183 Ill. App. 447.

Unless a customer is ready and willing to pay for gas, the company is not bound to supply him with it. Birmingham Ry., etc., Co. v. Pratt, 10 Ala. App. 273; 64 So. 510; 65 So. 533.

Where a gas company undertakes to furnish gas to the owner of a building, it cannot discontinue it

This statement, however, must be taken with the qualification that the customer has or is willing to comply with all reasonable rules and regulations of the company, such as it has a right to adopt and impose upon its customers.[16] A refusal of the customer to sign an agreement to abide by unreasonable rules will not deprive him of the right to a supply of gas.[17] Instances of discrimination will appear in succeeding sections; but a few may be added here. Thus the company cannot require a deposit of money by a particular customer to secure the payment of its charge, when it does not require such deposits of all its customers.[18] Where a water company laid its pipes in the street to supply certain persons with water who paid for the pipe under an agreement that if anyone else was furnished water the company should reimburse them for the amount they had paid, it was held that the company, notwithstanding this agreement, must supply all those whose property abutted upon the line, even though they had not paid anything on the pipe.[19] Customers who are stockholders in the company must be treated as other customers, and cannot be given a preferential rate, although those favored constitute a majority of the owners of the company's stock.[20] It is no excuse that the amount charged is the amount the company by statute may charge, if it is charging other customers less than the amount charged the one discriminated against.[21] So it is an

because the premises are more than 100 feet from the gas main; Transportation Corporations Law (Consol. Laws, 1909, c. 63), contemplating that the building shall be within that distance of the main in case of an original application for a gas supply, the company having waived that provision by furnishing the gas. Hollander v. Westchester Lighting Co., 140 N. Y. Supp. 544; 79 Misc. Rep. 646.

[16] Williams v. Mutual Gas Co., 52 Mich. 499; 18 N. W. Rep. 236; 50 Am. Rep. 266; 4 Am. and Eng. Corp. Cas. 66; Portland Natural Gas Co. v. State, *supra;* Cincinnati, etc., R. R. Co. v. Bowling Green, 57 Ohio St. 336; 49 N. E. Rep. 121; Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983; 42 S. W. Rep. 351; Charleston Nat. Gas Co. v. Low, 52 W. Va. 662; 44 S. E. Rep. 410.

[17] Shepard v. Milwaukee Gaslight Co., 15 Wis. 318; 82 Am. Dec. 679.

[18] Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983; 42 S. W. Rep. 351.

[19] Hangen v. Albina Light and Water Co., 21 Ore. 411; 28 Pac. Rep. 244; 14 L. R. A. 424.

[20] Crescent Steel Co. v. Equitable Gas Co., 23 Pittsb. Leg. (N. S.) 316.

[21] Griffin v. Goldsboro Water Co., 122 N. C. 206; 30 S. E. Rep. 319; 41 L. R. A. 240.

unjust discrimination to adopt a rule that it would furnish no gas to a tenant, and would only deal with the owner of the house occupied by the tenant or with his agent.[22] But it is not an unjust discrimination to charge a less rate to a manufacturer using a certain amount in one plant than is given a manufacturer operating several disconnected plants, although using as much as the larger manufacturer;[23] nor is it a discrimination that if a gas bill be paid within a certain time after due the gas company will allow a certain per cent. of discount upon it.[23a]

[22] State v. Butte City Water Co., 18 Mont. 199; 44 Pac. Rep. 966; 32 L. R. A. 697; 56 Am. St. Rep. 574; 4 Am. and Eng. Corp. Cas. (N. S.) 238; Leisenring v. Pennsylvania Lighting Co., 59 Pa. Super. Ct. 202.

But as a rule the tenant should sign the application or contract for gas; for only he can give the right of access to the premises to read the meter. Hitchcock v. Essex & H. Gas Co., 71 N. J. L. 565; 61 Atl. Rep. 397.

[23] St. Louis Brewing Ass'n v. St. Louis (Mo.), 37 S. W. Rep. 525.

That a private consumer cannot complain of such a discrimination, unless specially aggrieved, but only the public, see Boerth v. Detroit City Gas Co., 152 Mich. 654; 116 N. W. Rep. 628.

The undertaking of a gas company to supply manufacturers with gas for its boilers without detriment or inconvenience to the company's domestic consumers is within its common law duties. Egyptian Packing Co. v. Olney Gas Co., 183 Ill. App. 447.

A customer of a natural gas company cannot insist that he shall be furnished gas as a certain pressure when the other customers of the company are being furnished at a less pressure. Flaccus v. West Penn. Gas Co., 213 Pa. 561; 62 Atl. Rep. 111.

A municipality cannot discriminate between consumers. Rierker v. Lancaster, 14 Lanc. L. Rev. 393.

[23a] Bower v. United Gas Imp. Co., 37 Pa. Super. Ct. 113; State v. Board, 105 Minn. 427; 117 N. W. Rep. 827.

A foreign company having only a foreign franchise, being neither a citizen nor a householder of the State, whose sole business is the furnishing of a patent gas burner, has no standing in its own right to demand and receive gas from a domestic corporation for any purpose whatever. Public Service Corporation v. American Lighting Co., 67 N. J. Eq. 122; 57 Atl. Rep. 482; American Lighting Co. v. Public Service Co., 132 Fed. Rep. 794.

Where a natural gas company had agreed, in consideration of a right of way, to furnish the grantor gas at a certain rate, the contract being indefinite in time, and after many years conditions so changed that it was compelled to charge its customers increased rates, it was held that it could terminate the contract on reasonable notice. McCulloch, etc., Co. v. Philadelphia Co., 223 Pa. 336; 72 Atl. Rep. 633.

A company formed "for the purpose of producing, purchasing, and

§ 603. Failure of supply of natural gas.—Discrimination.

Another phase of discrimination is a refusal to supply new customers because of lack of gas to supply both them and its old customers. So long as a gas company occupies the streets of a municipality with its pipes it must serve all alike whose property abuts upon the street occupied by them. A defense of its inability to supply all its customers was brought forward by a natural gas company organized to furnish gas at actual cost; but the court held it was not a sufficient defense to an action to compel gas to be furnished to a new customer. "The

acquiring natural gas," and "of piping and transporting natural gas from the place or places where it is produced, purchased, or acquired," to certain named cities and towns, and "to other cities, villages, and places in the county aforesaid," is not bound to furnish gas to consumers in all such towns, cities and villages. East Ohio Gas Co. v. Akron, 81 Ohio St. 33; 90 N. E. Rep. 40.

A court of equity has power to grant a mandatory injunction to compel the supplying of gas upon non-discriminating terms, where a refusal to supply it has been made, except upon discriminating terms. Wilmer v. Louisville Water Co., 130 Fed. Rep. 251.

Monthly contracts may be at a higher rate than yearly contracts. Allegheny County Light Co. v. Shadyside El. L. Co., 37 Pa. Super. Ct. 79.

That construction of a gas company's contract, whereby it will be required to furnish all the natural gas to one consumer, in default of its duties to the general public, is not to be favored. Clairton Steel Co. v. Manufacturers' L. & H. Co., 240 Pa. 427; 87 Atl. 998.

A gas company is bound to furnish natural gas with a reasonable degree of equality to consumers along its line, but is not bound to furnish all such consumers with all the gas they may require. But under a natural gas company's contract whereby it agreed to deliver sufficient natural gas to supply all the works of a manufacturing company, at a pressure not to exceed 8 ounces, the gas company was obliged to furnish gas at a sufficient pressure at all times to operate the works, not exceeding 8 ounces and not less than 6 ounces, the pressure necessary for proper operation. Clairton Steel Co. v. Manufacturers' Light & Heat Co., 87 Atl. 998; 240 Pa. 427.

A natural gas company's contracts with consumers for exclusive service in consideration of reduced rates it was held not to authorize a discrimination in favor of such contract consumers against other consumers, where in other respects the service rendered was under substantially the same conditions, and the manifest object of such contracts was to monopolize the business. United Fuel Gas Co. v. Public Service Commission, 73 W. Va. 571; 80 S. E. 931.

legal effect of the answer," said the court, "is that the relatrix shall have no gas because her neighbors, in common right, have none to spare. It is admitted, because not denied, that the relatrix is a member of that part of the public which appellee has engaged to serve. As such she has borne her part of the public burdens. She has rendered her share of the consideration. Bellefontaine Street in front of her house has been dug up and her property made servient to the use of the appellee in laying its pipes, and in carrying forward its business, and the right to use the gas, and to share in the public benefit, thus secured, whatever it may amount to, is equal to the right of any other inhabitant of the city. The right to gas is held in common by all those abutting on the streets in which appellee had laid its pipes, or is held of right by none. The legislature alone can authorize the doing of the things done by the appellee, and this body is prohibited by the fundamental law from granting a sovereign power to be exercised for the benefit of a class, or for the benefit of any part of the public less than the whole residing within its range. Appellee's contract is with the State and its extraordinary powers are granted in consideration of its engagement to bring to the community of its operations a public benefit; not a benefit to a few, or to favorites, but a benefit equally belonging to every citizen similarly situated who may wish to avail himself of his privilege, and prepare to receive it. There can be no such thing as priority or superiority of right among those who possess the right in common. That the beneficial agency shall fall short of expectations can make no difference in the right to participate in it on equal terms. So if the appellee has found it impossible to procure enough gas fully to supply all, there is no sufficient reason for permitting it to say that it will deliver all it has to one class to the exclusion of another in like situation. It is immaterial that appellee was organized to make money for no one, but to supply gas to the inhabitants of Indianapolis at the lowest possible rate. It has pointed us to no special charter privilege, and under the law of its creation, certain it is, that its unselfish purpose will not relieve it of its important duty to the public. The principle

here announced is not new. It is as old as the common law itself. It has arisen in a multitude of cases affecting railroad, navigation, telegraph, telephone, water, gas and other like companies and has been many times discussed by the courts and no statute has been deemed necessary to aid the courts in holding that when a person undertakes to supply a demand which is affected with a public interest, it must supply all alike who are alike situated, and not discommode in favor of, nor against any."[24]

§ 604. Supply only to abutting property owners.

The general rule is that a gas company is required to supply only property abutting upon the company's lines or mains. There are many *dicta* to this effect.[25] But this question is often

[24] State v. Consumers' Gas Trust Co., 157 Ind. 345; 61 N. E. Rep. 674; 55 L. R. A. 245; Rierker v. Lancaster, 14 Lanc. L. Rev. 393; Indiana Natural Gas Co. v. State, 162 Ind. 690; 71 N. E. Rep. 133.

A natural gas company, for a good consideration, agreed to furnish gas to a person at a certain rate. The contract was indefinite as to time. After many years conditions changed, so that, to cover costs, which had greatly increased, the company was compelled to increase its rates to other consumers. It was held that it could terminate the contract on a reasonable notice. McCullock, etc., Co. v. Philadelphia Co., 223 Pa. 336; 72 Atl. Rep. 633.

Unless the contract specifies the pressure at which gas is to be furnished, it is not bound to furnish gas at a higher pressure to one customer than it is supplying then to other customers. Flaccus v. West Penn. Gas Co., 213 Pa. 561; 62 Atl. Rep. 111.

A contract to furnish gas so long as the line over a grantor of a right of way is in operation, will not entitle him to enjoin the removal of the line. Connersville Nat. Gas Co. v. Moffett, 164 Ind. 585; 73 N. E. Rep. 894.

A contract between a gas company and a city was held to obligate the company to bring natural gas to the city only if it was reasonably possible to do so. Jackson County, etc., Co. v. Independence, 188 Mo. App. 157; 175 S. W. 86.

[25] Griffin v. Goldsboro Water Co., 122 N. C. 206; 30 N. E. Rep. 319; 41 L. R. A. 240; Portland Natural Gas and Oil Co. v. State, 135 Ind. 54; 34 N. E. Rep. 818; 21 L. R. A. 639; Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479; Commonwealth v. Wilkes-Barre Gas Co., 2 Kulp. 499; Coy v. Indianapolis Gas Co., 146 Ind. 655; 46 N. E. Rep. 17; 36 L. R. A. 535; 8 Am. and Eng. Corp. Cas. (N. S.) 771. Even though the line was paid for by other consumers, so long as it laid in the street. Hangen v. Albina Light and Water Co., 21 Ore. 411; 28 Pac. Rep. 244; 14 L. R. A. 424.

regulated by a statute or ordinance frequently requiring the company to furnish gas to persons not upon its lines; as where they live within a "reasonable distance from the line of main pipes," in which event what is a "reasonable distance" is a question for the courts.[26] Where a statute required a company to furnish gas to the occupant of a building within 100 feet of any of its mains, it was held that the 100 feet was the space between its nearest main and the nearest portion of the building, and not to the portion for which gas was desired.[27] Of course, if there is a special contract existing between the would-be consumer and the company, then it is not a question whether or not the consumer is an abutting property owner, or his property lies within the prescribed distance; and even though the company is not bound to supply the applicant gas, by reason of the fact that his property is too remote, yet if it accept his application, with a full knowledge of that fact, it cannot deny him the right to the gas after such acceptance. No doubt the company can require of such an applicant an extra price for the gas, and for putting in pipe to his premises; for the whole matter lies in a special contract and not in a general duty to supply the public.

§ 605. Extension of mains or pipes.

A gas company is not bound to extend its mains or pipes to territory not occupied by it,[a] unless a statute, or a binding

[26] West Hartford v. Hartford Water Com'rs, 68 Conn. 323; 36 Atl. Rep. 786.

[27] Jones v. Rochester Gas, etc., Co., 7 N. Y. App. Div. 465; 39 N. Y. Supp. 1105; affirmed 158 N. Y. 678; 52 N. E. Rep. 1124.

A foreign company whose only interest in a city arises out of a contract with the city to furnish burners for street lamps owned by the city and to supply gas for such burners for a stated time, is not entitled in its own right to a preliminary injunction to compel a gas company to sell it gas for such purpose; and an injunction will not be granted if it appears that it would be detrimental, rather than beneficial, to the public. American Lighting Co. v. Public Service Corporation, 132 Fed. Rep. 794.

Where, without the knowledge or consent of a natural gas company, the owner of a stove connected it with the company's pipes, and afterward paid the company for the gas used, it was held that from thence on he was a consumer and entitled to gas. Citizens' Gas & Oil Min. Co. v. Whipple, 32 Ind. App. 203; 69 N. E. Rep. 557.

[a] Zeilda Forsee Imp. Co. v. St. Joseph Gas Co. (Mo. App.), 195 S. W. 52.

ordinance, its charter or a contract requires it to do so, even though it have the privilege to occupy any street or all the streets of the municipality. But the matter of extension of mains almost universally is governed by a statute or the company's contract (usually embodied in an ordinance) with the municipality. Sometimes the municipal governing body has the power to order and enforce an extension of the mains; and in other instances the gas company is bound to extend a main only upon application of a certain number of persons agreeing to take gas.[27a] Usually the question whether a gas company should be required to extend its mains, except where a statute or the company's franchise expressly require it, so as to give service to individuals, depends upon the test whether it should reasonably be called upon to give such service, and not whether the service will be remunerative.[27b] Even though a gas company may occupy all the streets of a city, yet it is not required to extend its mains except under contract or by a statute, unless the property is within a "reasonable distance," or there exists a reasonable expectation that the consumption of gas will warrant the necessary expense.[27c]

[27a] Unless a statute or ordinance requires it, a gas company is not bound to extend its mains if there be no reasonable expectation that the consumption of gas will warrant the necessary expenditure. Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122; 57 Atl. Rep. 482; State v. Consumers' Gas Trust Co., 157 Ind. 345; 61 N. E. Rep. 674; 55 L. R. A. 245; Haugen v. Albina L. & W. Co., 21 Ore. 411; 28 Pac. Rep. 244; 14 L. R. A. 424; State v. Seattle Lighting Co., 60 Wash. 81; 110 Pac. Rep. 799. See Fair v. Home Gas. etc., Co., 13 Cal. App. 589; 110 Pac. Rep. 347, for a complaint.

[27b] New Britain Gaslight Co. (Conn.), 99 Atl. 559.

[27c] Zeilda Forsee Imp. Co. v. St. Joseph Gas Co. (Mo. App.), 195 S. W. 52; Citing Board v. Bloomfield, 84 Conn. 522; 80 Atl. 794; Upper Alton v. Alton Gas Co., 165 Ill. App. 333; Public Service Co. v. American Lighting Co., 67 N. J. Eq. 122, 131; 57 Atl. 582, 586; Minneapolis General El. Co. v. Minneapolis, 194 Fed. 215; Lawrence v. Richards, 111 Me. 95; 88 Atl. 42; 47 L. R. A. (N. S.) 654; Watson v. French, 112 Me. 371; 92 Atl. 290; L. R. A. 1915, C. 355. See also People v. McCall, 219 N. Y. 87; 113 N. E. 795; Ann. Cas. 1913, E. 1042, reversing 171 App. Div. 580; 157 N. Y. Supp. 707 (order for extension upheld); Landon v. Public Utilities Co., 234 Fed. 152 (receivers ordered to extend mains); Smith v. Capital Gas Co., 132 Cal. 209; 64 Pac. 258; 54 L. R. A. 769; Lukrewka v. Spring Valley Water Co., 169 Cal. 318; 146 Pac. 640; Ann. Cas. 1916, D. 277.

Though the contract of gas and electric company with a city re-

§ 606. Inspection of premises.

Elsewhere has been discussed the right of a company to inspect the meter and so much of the pipe as lies between the meter and the company's mains,—or as it is frequently called, the supply pipe.[28] The right of the company, however, to inspect the house pipes, chandeliers, gas burners, furnaces, stoves and heaters in which gas is burned, is another question. In the case of furnaces, stoves and heaters where the company has lawfully reserved the right to insist upon the use of certain kinds, there is no doubt of the right of the company to insist upon an inspection at proper times under proper limitations, to see if their requirements have been complied with. And perhaps the company has the right to insist upon an examination of the pipes, burners and chandeliers when application is made, to see if the house or building is equipped for the use of gas, although there is some doubt on the question; for the company is not bound to furnish gas to an applicant not prepared to properly receive it.[29] Thus in a New York case it was said: "As the company have no control over the piping, does not put it in, and is not consulted about it, the principle upon which it might be held liable, in cases of this character, at the time

quires it to extend its services on the application of five patrons, a duty to make an extension may arise without such application. Burke v. Ottawa Gas & Electric Co., 123 P. 857; 87 Kans. 6.

Under a contract by a gas company that it would repay to a consumer, on the cost of a main extension partly paid for by him, $55 for each new consumer obtained "on said extension" within one year, the consumer so contracting is not entitled to any refund for new gas consumers whose residences are not on the street in which the extension is laid nor connected directly with the extension, but on a street a block distant and served by another extension. County Gas Co. v. Templeton (Tex. Civ. App.), 185 S. W. 942.

Sufficiency of a petition filed before Public Utilities Commissioners of Connecticut for extension of mains. See New Britain Gaslight Co. v. Root (Conn.), 99 Atl. 559.

It is the duty of a gas company to extend its mains where there is public need of them, even though thereby dividends or preferred stock cannot be declared. Burk v. Ottawa Gas & El. Co., 87 Kans. 5; 123 Pac. 857.

[28] See Young v. Southwark, etc., Co., 69 L. T. 144; 41 W. R. 622; 57 J. P. 806; 5 R. 432, and Wilkes-Barre Gas Co. v. Turner, 7 Kulp 399.

[29] State v. New Orleans, etc., Co., 108 La. 67; 32 So. Rep. 179.

of the first delivery of gas, if no precaution were taken at all, is simply that it would have the right to refuse to turn on, or permit others to turn on, the gas for the supply of the applicants until properly assured of the condition of the piping in other portions of the building. Having become assured of it, and the gas being on, it would not seem that the company ought further to be regarded as liable for the continuous good condition of the piping. Here we may justly say that to impose such a liability upon the defendant would clearly be unreasonable. It would render necessary the examination, at frequent intervals, of all the buildings in the city in which gas was used. This would be so onerous as to be practically impossible of execution; because of the expense to the company."[30] No doubt exists, however, that a company may adopt a rule providing for inspection, upon proper notice given of the time when it would be made; and perhaps the rule might provide for inspection at any time during business hours of the day.[31] And an agreement on the part of the consumer to permit an inspection is binding upon him.[32] Where a gas company, upon contract with the owner of the property, laid a supply pipe from its main to his house; and gas escaping because of a defect in the pipe, causing an explosion, the company was held liable.[33] This liability would, of course, carry a right to enter upon the premises to inspect the supply pipe. But where the owner of the property put in the supply pipe, which became defective after use, and an explosion occurred; it was held that the company was not liable, because of the fact that the owner of the property had put in the pipe. From this it would seem that the company had no right to inspect the supply pipe.[34]

[30] Schmeer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 70 N. Y. St. Rep. 92; 30 L. R. A. 653.

[31] Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479.

[32] Wright v. Colchester Gas Co., 30 Gas J. 336; Hitchcock v. Essex & H. Gas Co., 71 N. J. L. 565; 61 Atl. Rep. 397; affirming 70 N. J. L. 492; 57 Atl. Rep. 135.

[33] Burrows v. March Gas and Coke Co., L. R. 7 Ex. 96; 41 L. J. Exch. 46; 26 L. T. 318; 20 W. R. 493.

[34] Henderson v. New Castle and Gateshead Gas Co., 37 Sol. J. 403.

As a gas company has the right to have access to the meter, in order to read it, it may insist that the tenant, and not the landlord, sign the application for gas; because only the tenant can give the right to visit the premises. Vanderberg v. Kansas City Gas Co., 125 Mo. 600; 105 S. W. Rep. 17.

§ 607. Mandamus to compel supply.

Any person whose property abuts upon a gas company's line (and a tenant is such a person), and who has complied with the rules and regulations of the company, and prepared his house or building for the reception of gas, and is not in arrears for gas supplied in the manner and form heretofore discussed,[35] may compel the company by a writ of mandamus to supply him with gas, if it refuses or neglects to do so upon proper application made.[36] So mandamus will lie to compel a deputy inspector of gas meters for the city to inspect the consumer's meter, and if found correct, to seal or stamp it, where a statute requires all meters to be used to be examined, sealed and stamped before used.[37] To entitle the applicant to the writ, it is not necessary that he should have an interest in the company different from that held by other citizens; and it is no defense that he is already supplied by another company.[38] But the consumer must be ready to receive the gas when he makes his application for it and when he applies for a writ of mandamus; for a company should not be subject to the costs and annoyance of such a proceeding where a customer is not ready to use the gas.[39] If the company has demanded an illegal rate, it is not necessary for the consumer to tender the amount actually payable, where the rate is payable in advance, before bringing his action; but in his petition he may state his ability to pay and a willingness

[35] State v. New Orleans, etc., Co., 108 La. 67; 32 So. Rep. 179.

If an applicant is in no position to require a gas company to supply him with gas, the fact that the company put its refusal on an untenable ground is immaterial. Vanderberg v. Kansas City Gas Co., 126 Mo. App. 600; 105 S. W. Rep. 17.

[36] Richmond, etc., Gaslight Co. v. Middletown, 59 N. Y. 228; 1 T. and C. 143; People v. Manhattan Gaslight Co., 45 Barb. 136; 1 Abb. Pr. (N. S.) 404; 30 How Pr. 87; State v. Consumers' Gas Trust Co., 157 Ind. 345; 61 N. E. Rep. 674; 55 L. R. A. 245; Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479; Portland Natural Gas and Oil Co. v. State, 135 Ind. 54; 35 N. E. Rep. 818; 21 L. R. A. 639; Hangen v. Albina Light and Water Co., 21 Ore. 411; 28 Pac. Rep. 244; 14 L. R. A. 424; Crumley v. Watauga Water Co., 99 Tenn. 420; 41 S. W. Rep. 1058; Bloomfield, etc., R. R. Co. v. Richardson, 63 Barb. 437; Williams v. Mutual Gas Co., 52 Mich. 499; 18 N. W. Rep. 236; 50 Am. Rep. 266; 4 Am. and Eng. Corp. Cas. 66; Johnson v. Atlantic City Gas & W. Co., 65 N. J. Eq. 129; 56 Atl. Rep. 550; Seymour Water Co. v. Seymour, 163 Ind. 120; 70 N. E. Rep. 514; Topeka v. Topeka Water Co., 58 Kan. 349; 49 Pac. Rep. 79. *Contra*, Commercial Bank v. London Gas Co., 20 Up. Can. Q. B. N. C. 233; State v. New Orleans, etc., Co., 108 La. 67; 32 So. Rep. 179.

[37] *In re* McDonald, 16 N. Y. Misc. Rep. 304; 39 N. Y. Supp. 367.

[38] Portland Gas Co. v. State, *supra*.

[39] Portland Gas Co. v. State, *supra;* Shepard v. Milwaukee Gaslight Co., *supra*.

to do so upon granting the writ or before any gas is actually furnished.[40] The duty to supply gas includes turning it on when applied to for that purpose, the proper connections having been made, the meter need not be furnished if the company is to furnish it.[41] As a rule the right to the writ is limited to those whose property abuts upon the company's mains or pipes; and it is not awarded to those to whom the company would not be compelled to extend its mains, especially if the cost of the extension would be out of proportion to the income that would be received.[43] But this question is often regulated by statute or an ordinance requiring the company to extend its mains to regions not occupied by it upon demand of a prospective customer or of a certain number of customers. It is no defense to the writ that the company has not enough gas,—as natural gas,—to supply its then customers; and to compel them to take on additional customers would injure their present customers.[45] If the company would have the right to turn off the gas, if it were supplying it, because of a failure of the applicant to pay past bills that he owes, then he cannot successfully insist upon his rights to the writ; and this is true even though they had furnished him gas upon his application after such bills were due.[46] A person who intends to make only occasional use of the gas is not entitled to the writ as, for instance, to use it only when the electric light in his house should fail.[47]

[40] Northern Colorado, etc., Co. v. Richards, 22 Colo. 450; 45 Pac. Rep. 423.

[41] Schmeer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 70 N. Y. St. Rep. 92; 30 L. R. A. 653.

[43] State v. Consumers' Gas Trust Co., *supra;* Hangen v. Albina Light and Water Co., *supra;* Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122; 57 Atl. Rep. 482.

[45] State v. Consumers' Gas Trust Co., *supra.*

[46] People v. Manhattan Gaslight Co., 45 Barb. 136; 30 How. Pr. 87; 1 Abb. Pr. (N. S.) 404.

[47] Smith v. Capitol Gas Co., 132 Cal. 209; 64 Pac. Rep. 258; Fleming v. Montgomery Light Co., 100 Ala. 657; 13 So. Rep. 618; Adams Express Co. v. Cincinnati Gaslight and Coke Co., 10 Ohio Dec. 389; 21 Wkly. Law Bull. 18.

Upon unreasonable refusal to continue to supply a city with gas at a fair price, the city may sue to *enjoin the stoppage* of the supply. Public Service Gas Co. v. Newark, 86 N. J. Ch. 384; 98 Atl. 404.

Upon a showing that a consumer's gas supply was unlawfully cut off by the gas company without his consent the *burden* is upon the company to justify by showing an *indebtedness* by the consumer to it which he has refused to pay, if that be relied on in justification. Hollander v. Westchester Lighting Co., 79 Misc. Rep. 646; 140 N. Y. Supp. 544.

See where the remedy was held to be an application to the Public Utilities Company, there being a controversy between the city and the company concerning gas meter deposits. Scammon v. American Gas Co., 98 Kans. 812; 160 Pac. 316.

§ 608. Mandamus to compel furnishing of gas to a city.

There is no doubt that a municipality may compel a gas company to furnish gas under a contract it has with it, the same as a private individual; and is not compelled to resort to an action for damages.[48]

§ 609. Penalties for failure to supply gas.— Damages.

Often statutes inflict penalties upon a gas company for a neglect or refusal to furnish gas. This is especially true in England. Thus a statute of that country[49] provides that if it be shown before any two justices of the peace "that any day the gas supplied by the undertakers is under less pressure, of less illuminating power, or of less purity than it ought to be according to the provisions of" that or of a special act referred to, "the undertakers shall in every such case forfeit and pay to the local authority or other persons making application for testing the gas such sum not exceeding twenty pounds, as the justices shall determine." It was held that this statute applied to a case where the company improperly cut off the gas, for the reason that a refusal or neglect to supply gas was a neglect or refusal to supply it under the pressure the statute required.[50] Under this statute the penalties form the only remedy, no action lying for damages.[51] Under this and similar statutes it is held in that country that the consumer cannot set up as a defense the gas supplied was of an inferior quality, such a defense being only ground for claiming a fine from the company.[52] In

[48] Toledo v. N. W. Ohio Natural Gas Co., 5 Ohio C. C. 557; 3 Ohio Cir. Dec. 273; Williams v. Mutual Gas Co., 52 Mich. 499; 50 Am. Rep. 266; 18 N. W. Rep. 286; 4 Am. and Eng. Corp. Cas. 66; People v. New York, etc., Water Co., 56 N. Y. Supp. 364.

[49] 34 and 35 Vict. [1871], Ch. 41, Sec. 36.

[50] Commercial Gas Co. v. Scott, L. R. 10 Q. B. 400; 44 L. J. M. C. 171; 32 L. T. (N. S.) 765; 23 W. R. 874; 44 L. J. Q. B. 715.

[51] Atkinson v. New Castle W. W. Co., L. R. 2 Exch. Div. 441; 46 L. J. Exch. 775; 25 W. R. 794; 36 L. T. 761 (reversing L. R. 6 Exch. Div. 404; 20 W. R. 35, and disapproving Couch v. Steel, 3 E. and B. 402); Clegg v. Earby Gas Co. [1896], 1 Q. B. 592; 65 L. J. Q. B. 339. See Johnston v. Toronto Consumers' Gas Co. [1898], App. Cas. 447; 78 L. T. 270.

[52] Porquay Gas Co. v. Carter, 32 Gas J. 490; Great Central Gas Consumers' Co. v. Tallis, 3 Gas J. 5. See Gaslight and Coke Co. v. St. George, 42 L. J. Q. B. (N. S.) 50.

New York it was held that the company was not liable to place a gas meter on plaintiff's floor, where he resided in an apartment house, if gas was furnished the building, unless he put in a separate service or supplying pipe.[53] A statute requiring a gas company to supply the owner or occupant of a building rendering the company liable to only one action to recover a penalty, for a failure to supply gas, of ten dollars, and the further sum of five dollars for every day of refusal; and a subsequent action for penalties accruing during the continuance of the default in the absence of a new application cannot be maintained.[54] Under the New York statute before the penalty is incurred, an application must be presented, stating, among other things, the number of lights (and in case of an electric lighting company, how much power) is required, especially where the company at the time it receives the application requested such information.[55]

[53] Ferguson v. Metropolitan Gaslight Co., 37 How Pr. 189.

[54] Jones v. Rochester, etc., Co., 168 N. Y. 65; 60 N. E. Rep. 1044; reversing 64 N. Y. Supp. 1138.

In Jones v. Rochester, etc., Co., 39 N. Y. Supp. 1105, 1110; 7 N. Y. App. Div. 465; affirmed 158 N. Y. 678; 52 N. E. Rep. 1124, it was held that a succession of penalties under this statute may be recovered in successive actions. In this case there was a dispute between the customer and company.

The statute referred to in these cases did not apply to natural gas companies organized under the "business corporation law." Wilson v. Tennant, 70 N. Y. Supp. 2; 61 N. Y. App. Div. 100; affirming 65 N. Y. Supp. 852; 32 Misc. Rep. (N. Y.) 273.

[55] Andrews v. North River, etc., Co., 23 N. Y. Misc. Rep. 512; 51 N. Y. Supp. 872.

In this state a statute provides that if a gas company on application of an owner of a building refuses or neglects to supply gas, though there may be arrears due for gas supplied to a former tenant, it shall be liable to a penalty. It was held that this statute does not cover merely the case of a refusal to begin a supply of gas after an application made, but covers an instance where the supply has been cut off after it has once commenced. Hoch v. Brooklyn Borough Gas Co., 117 N. Y. App. Div. 882; 103 N. Y. Supp. 370. Unless a written application for gas be made no penalty is incurred. Shelley v. Westchester Lighting Co., 119 N. Y. App. Div. 61; 103 N. Y. Supp. 951; and if a written application be made, and a beginning to supply gas be made and then the supply shut off, a second written application is necessary before the penalty can be inflicted, even though the gas company waive the written application.

Ibid; Shelley v. Westchester Lighting Co., 128 N. Y. App. Div. 890; 112 N. Y. Supp. 1146; reversing 55 N. Y. Misc. Rep. 105; 105 N. Y. Supp. 133. Leaving a blank unfilled where the word "gas" should have been inserted will not invalidate the written application. Shelley v. Westchester Lighting Co., 139 N. Y. App. Div. 690; 124 N. Y. Supp. 484.

The gas company has the burden to show the debt for which gas was shut off and the plaintiff is not bound to plead a willingness to keep the tender of the amount due good. Levine v. Brooklyn Gas Co., 131 N. Y. Supp. 255.

In England where a statute required water rates to be paid quarterly in advance, a water company is not liable to a penalty for a failure to supply water if the complainant has not paid the rate in advance, although it is not the custom of the company to take prepayment. Kyffin v. East London W. W. Co., 66 Gas Jr. 243; Thorn v. East London W. W. Co., 66 Gas Jr. 189; Sheffield W. W. Co. v. Brooks, 8 Q. B. Div. 632; 51 L. J. M. C. 97; 30 W. R. 889; 46 J. P. 548. See Sheffield W. W. Co. v. Wilkinson, 4 C. P. Div. 410.

The laws of New York, 1859, Ch. 3311, Sec. 6, imposing a penalty on gaslight companies, which, for ten days after an application for gas neglects to supply it, applies where, although gas has been furnished within the ten days, there has been a neglect to give a continuous supply. Meiers v. Metropolitan Gaslight Co., 11 Daly 119.

In one section of the Civil Code of California it is provided that on the written application of the owner of a building, and payment of all money due from him, a gas company must supply gas for such building; and on refusal, must pay a certain amount per day as liquidated damages. Another section provides that an obligation for the payment of money is extinguished by a due offer of payment if the amount is immediately deposited in the name of the creditor with some bank, and notice thereof given the creditor. It was held that a tender of the amount already due for gas, unaccompanied by a deposit thereof to the credit of the gas company, was not sufficient to lay a basis for an action under the first mentioned section. Baker v. San Francisco G. & El. Co., 141 Cal. 710; 75 Pac. 342; Fair v. Home Gas, etc., Co., 15 Cal. App. 705; 115 Pac. 754.

In Alabama a municipal corporation may adopt an ordinance imposing a fine or imprisonment on an officer or employee of a water company for the exaction of a rate in excess of that stipulated in a contract between the company and the city for a supply of water for the city and its citizens, but not for the commission of an act authorized by such contract. Crosby v. Montgomery, 108 Ala. 498; 18 So. Rep. 723.

A municipality cannot adopt an ordinance requiring a railroad company to maintain a particular kind of light at its crossings in its municipal boundaries, though it may require it to maintain a sufficient light to protect travelers. Cleveland, etc., Ry. Co. v. Connersville, 147 Ind. 277; 46 N. E. Rep. 579; *Contra*, Cincinnati, etc., R. R. Co. v. Bowling Green, 57 Ohio St. 336; 49 N. E. Rep. 121.

In an action in New York to recover penalty for discontinuing an existing supply of gas, the complaint need not allege that plaintiff's premises are within 100 feet of the gas main, as required by Transportation Corporations Law (Consol. Laws, 1909, c. 63), in case of an original application to furnish gas; the fact that they are not being a matter of defense. Hollander v. Westchester Lighting Co., 140 N. Y. Supp. 544; 79 Misc. Rep. 646.

§ 610. Damages for failure to supply gas.—Sickness.

Where a company undertakes to supply a customer in a municipality with gas under an ordinance requiring it to do so, or under its general public duty, and it fails to do so, especially after it has begun to supply him, it will be liable to him in an action of tort for all damages traceable to the wrong done, arising without an intervening agency and without the fault of the injured party. And it is also a tort, under such circumstances, where a contract existing between the company and the consumer, such as is usually entered into by consumers in a municipality. "The failure to perform such a contract is in itself a 'tort.'" [56] In such an instance it is no defense for the company that it did not have the gas to furnish or enough to furnish the full amount it had agreed to furnish if it fully supplied other customers; nor is it a defense that the consumer could have recovered back an amount of the sum he paid proportionate with the amount of gas it had failed to supply. In such an action the consumer may show that other consumers in buildings received an insufficient supply, where it is shown that such buildings were attached by means that would furnish as much or more gas than the attachment at his own stove. If the company take pay for the gas and retain it, it is no excuse that the supply of gas failed, and it, for that reason could not keep its contract. Nor is it a defense that the consumer removed his mixer and burned the gas without using it, as the rules of the company and his contract with it required, it having received pay for the gas in advance.[57] Where there is a failure to supply merely illuminating gas, the consumer has a right to recover back not only what he has paid for the gas

[56] Coy v. Indianapolis Gas Co., 146 Ind. 655; 46 N. E. Rep. 17; 36 L. R. A. 535; 8 Am. & Eng. Corp. Cas. (N. S.) 771; Indiana, etc., Gas Co. v. Anthony, 26 Ind. App. 307; 58 N. E. Rep. 868; Hoehle v. Allegheny Heating Co., 5 Pa. Super. Ct. 21; 40 W. N. C. 553; 28 Pittsb. L. J. (N. S.) 65. (This is especially true if the contract is only a statement of the reasonable conditions under which the company was required to perform its duty.) Shepard v. Milwaukee Gaslight Co., 15 Wis. 318; 82 Am. Dec. 679; Boal v. Citizens' Natural Gas Co., 23 Pa. Super. Ct. 339; Miller v. Wilkesbarre Gas Co., 206 Pa. 254; 55 Atl. Rep. 974; Greenfield Gas Co. v. Trees, 165 Ind. 209; 75 N. E. Rep. 2; Carroll v. Erie County, etc., Fuel Co., 13 Ont. W. R. 795; affirming 10 Ont. W. R. 1017.

[57] Indiana, etc., Gas Co. v. Anthony, 26 Ind. App. 307; 58 N. E. Rep. 868.

not furnished, but also the damages he has suffered in his business, as well as for the inconvenience and annoyance experienced by him in his business, if it was to be supplied for the purpose of lighting up his business establishment, arising out of the refusal to furnish gas.[58] This, of course, would include loss of profits. And where the owner of a business house prepared it ready to receive the gas, it was held that he could recover from the company refusing him gas the depreciation of the property for sale or lease, and the expense of restoring the property to a proper condition, divested of the gas pipes, in addition to other damage legitimately flowing from such refusal.[59] An aeronaut of some celebrity brought suit to recover damages estimated at over 500 dollars, occasioned by a failure of a gas company to keep a contract to supply his balloon with gas, on an occasion of an intended ascent in a city; and it was held that the plaintiff was entitled to maintain the action.[60] But a boarding house keeper was not allowed damages for loss of the profits she would have derived from her boarders who left because of a failure of the company to furnish gas.[61] Yet where a natural gas (or other) gas company undertakes to furnish gas for heating purposes, and fails to do so, it will be liable, after notice of the probable effects of such failure and the consumers' inability to procure other fuel, in damages, for sickness occasioned thereby to the consumer and his family, even for the death of his child or wife,[62] unless the company show that it was beyond its power to furnish the gas.[63] Where a

[58] Shepard v. Milwaukee Gaslight Co., 15 Wis. 318; 82 Am. Dec. 679; Baltimore Gaslight Co. v. Colliday, 25 Md. 1; Whitehouse v. Liverpool, etc., Co., 5 C. B. 798; 5 M. Gr. and S. 798; Kokomo, etc., Co. v. Albright, 18 Ind. App. 151; 47 N. E. Rep. 682, rental of houses recovered.

[59] Baltimore Gaslight Co. v. Colliday, 25 Md. 1; Bedding v. Imperial Gaslight Co. 7 Gas J. 418.

[60] Hampton v. Oxford Gas Co., 3 Gas J. 64.

[61] Morey v. Metropolitan Gas Co., 6 J. and S. (N. Y.) 185. The soundness of this decision may well be doubted.

[62] Coy v. Indianapolis Gas Co., *supra;* Indiana, etc., Gas Co. v. Antnony, *supra;* Hoehle v. Allegheny Heating Co., 5 Pa. Super. Ct. 21; 40 W. N. C. 553; 28 Pittsb. L. J. (N. S.) 65.

[63] Coy v. Indianapolis Gas Co., *supra.*

company enters into a contract to furnish a glass factory with gas to run its pots and failed to keep it, the glass business being new in that vicinity, and the expense necessarily and actually incurred in organizing the factory, its fair rental value when idle, if it had any, and if it had none, the interest on the money invested therein, together with the interest on any idle working capital, the value of which had been lost by a violation of the contract, the cost of bringing new and skilled workingmen from a distance, none being in that vicinity; the cost of their transportation, and the compensation agreed or required to be paid for the service of the glass company's affairs may be treated as a part of the necessary expenses and damages recoverable.[64] It is no defense that the insufficient supply was occasioned by the freezing of the gas mains, if the company was careless in protecting them from the frost; and the presumption is that the gas mains would not have frozen up if properly protected.[65] If the company improperly cut off the gas, to enforce the payment of a bill for which the consumer was not liable to pay, it will be liable for the damages thereby occasioned.[66] But a consumer cannot recover damages for a failure to supply gas under a contract giving him an illegal preference,— as with the directors and stockholders,— for all consumers within a municipality must be served alike.[67]

[64] Paola Gas Co. v. Paola Glass Co., 56 Kan. 614; 44 Pac. Rep. 621.

[65] Stock v. Boston, 149 Mass. 410; 21 N. E. Rep. 871. Not liable in case of frost of an exceptional character. *In re* Richmond Gas Co. [1893], 1 Q. B. 56.

[66] Merrimac River Saving Bank v. Lowell, 152 Mass. 556; 26 N. E. Rep. 97; 10 L. R. A. 122.

[67] Shoenberger v. Equitable Gas Co., 22 Pittsb. L. J. (N. S.) 347; Crescent Steel Co. v. Equitable Gas Co., 23 Pittsb. Leg. J. (N. S.) 316.

Where no pecuniary loss is shown, the damages recoverable are nominal. Detroit Gas Co. v. Moreton, etc., Co., 111 Mich. 401; 69 N. W. Rep. 659.

Profits cannot be recovered unless there be evidence of loss of profits. Miller v. Wilkesbarre Gas Co., 206 Pa. 254; 55 Atl. Rep. 974.

The plaintiff may recover the difference between what he was to pay for gas and what he had to pay to get other gas, when such is the case. Carroll v. Erie County, etc., Fuel Co., 13 Ont. W. R. 795, affirming 10 Ont. W. Rep. 1017.

In an action for damages occasioned by shutting off gas, it must be alleged that the plaintiff complied with, or offered to comply with, the reasonable regulations of the company before or when it shut off the gas; and it is not enough to merely aver, by way of conclusion

§ 611. Limiting liability for failure to supply gas.

A company has no right or power to limit its liability to furnish a sufficient supply of gas within a municipality. A duty is imposed by law to supply gas against which it cannot

and recital, that, after being tendered its charges, the company wrongfully and unlawfully turned off the gas. Greenfield Gas Co. v. Trees, 165 Ind. 209; 75 N. E. Rep. 2.

If the servants of a gas company wrongfully remove and destroy the fixtures and connections of a rival company whereby plaintiff and her tenants are deprived of heat, thereby causing her tenants to leave, the plaintiff may recover the cost of replacing the fixtures and connections, and also reasonable compensation for loss of profits because of her tenants leaving her, as well as damages for personal inconvenience and discomfort. In fact, on notice to restore and repair the premises, exemplary damages may be recovered. Kentucky Heating Co. v. Hood, 133 Ky. 383; 118 S. W. Rep. 337.

A complaint seeking damages because of a failure to supply gas must aver a readiness and willingness to pay for the gas. Birmingham Ry., etc., Co. v. Pratt, 10 Ala. App. 273; 65 So. 533. As to an insufficient complaint, see Smith v. Bell, 217 Fed. 243; 133 C. C. A. 517, but where the gas company discontinues service on the refusal of the plaintiff to pay an existing debt (and it appears in the complaint), the gas company must show the debt and refusal to pay, and the plaintiff is not bound to plead a willingness to keep a tender of the amount due good, or pay the money into court. Levine v. Brooklyn Union Gas Co., 131 N. Y. Supp. 255.

Evidence that plaintiff had been arrested for stealing gas is not admissible. Anderson v. Seattle Lighting Co., 71 Wash. 161; 127 Pac. 1108.

The plaintiff's evidence should afford a basis for compensation for the expense, loss of time, and other deprivations caused by a breach of the contract to furnish gas, where the action is upon a contract to furnish it. Hall v. Philadelphia Co., 74 W. Va. 172; 81 S. E. 727.

Where a natural gas company's written proposition to furnish gas subject to the terms of their "regular contract" was accepted by a manufacturing company and thereafter a contract was entered into which provided that letters between the parties should be made a part of it, the contract was subject to the regular terms and conditions of the gas company's regular contract, which relieved it in case of failure of supply. The price quoted was held to apply only to those terms and conditions existing when the contract was entered into and not to those to be performed afterwards. Clairton Steel Co. v. Manufacturers' Light & Heat Co., 87 A. 998; 240 Pa. 427.

In a contract by a gas company to furnish a city with natural gas if reasonably possible, a provision for forfeiture of a deposit as liquidated damages was held the imposition of a penalty; and in an action to recover back the amount of the deposit it was held not necessary for the company in order to

shield itself by a contract with the customer.[68] If the supply in case of natural gas should fail, that would be a defense, in case the company had made all efforts to furnish the gas; for natural gas is an article that cannot be manufactured, a quite different situation from an instance of supplying artificial gas. But it is quite another proposition where the company is under no duty to furnish gas. There the company may limit its liability; for the right to gas in that case rests wholly upon contract. Thus, in case of natural gas the contract may be to furnish it for a plant so long as the company has gas, and the contract is not void for indefiniteness, even though the consumer use gas for domestic purposes.[69] Where a company agreed to furnish gas to certain customers so long as with ordinary diligence and outlay it could procure gas under the contracts then ordinarily in use by gas companies, it was held that its "diligence and outlay" was to be measured as of the date of the contract, and not under conditions entirely altered.[70]

§ 612. Application for gas.

A gas company may require the applicant for gas to sign a

recover to show that the city had spent the deposit or converted it to its own use. After reasonable effort to get gas, the company, it was held, was not bound to continue its efforts, unless such continuation would have made it reasonably possible to secure it. Jackson County, etc., Co. v. Independence, 188 Mo. App. 157; 175 S. W. 86.

[68] Sec. 601.

[69] Xenia Real Estate Co. v. Macy, 147 Ind. 568; 47 N. E. Rep. 147; Black Lick v. Saltsburg, 139 Pa. St. 448; 21 Atl. Rep. 432; Whitman v. Fayette Fuel Gas Co., 139 Pa. 492; 20 Atl. Rep. 1062; Connersville Nat. Gas Co. v. Moffett, 164 Ind. 585; 73 N. E. Rep. 894.

[70] Crescent Steel Co. v. Equitable Gas Co., 23 Pittsb. L. J. (N. S.) 316; Bruce v. Indianapolis Gas Co., 46 Ind. App. 193; 92 N. E. Rep. 189.

If a person without a gas company's knowledge connect his pipes with its pipes and use its gas; and on the company's discovering the connection and uses of the gas he pays it for the gas used, he, from thence on, becomes a consumer of gas and is entitled to use it, unless ordered by the company to cease. Citizens' Gas & Oil Co. v. Whipple, 32 Ind. App. 203; 69 N. E. Rep. 557.

A contract with a gas company by which the owner of lots paid the whole amount in advance for laying and connecting certain gas mains, was held not divisible, so as to allow him to recover for failure to make the connections on the remaining lots after the supply of natural gas had wholly failed. Bruce v. Indianapolis Gas Co., 46 Ind. App. 193; 92 N. E. Rep. 189.

written application, containing a general description of the premises to be supplied and an agreement to abide by the rules and regulations of the company.[71] But if any of the rules are unreasonable, the applicant will not be bound by them, even though he agree to them; for his agreement is under the nature of a compulsion, to secure a service to which he is otherwise entitled to have. In a contest, the court will determine whether or not the rules are reasonable, of any particular one of which complaint is made. These rules may be embodied in the application; or may be made a part of it by apt words of reference thereto. But even this is not necessary; for the applicant will be bound by all reasonable rules of the company brought to his attention without an express agreement concerning them.[72] If only an oral application is made, and the company refuse to supply gas for a particular reason, not refusing because a written application is not made, it thereby waives its right to demand a written application, although its rules require it.[73] The company may reserve the right to cut off the gas to preserve itself from fraud or abuse; but it cannot assume to itself the whole power to decide upon the question of fraud or abuse, without notice, without trial, and upon its own mere motion.[74] Nor can it insert in the application an agreement or adopt a rule that the applicant, after admission of gas into his pipes, must not disconnect or open them for repairs or extensions, or otherwise, without a permit from the company, under a penalty of three times the amount of damages sustained.[75] Where a rule of the company required the application to be in writing, the general agent and manager of the business of a merchant residing in another and distant city, but having an extensive

[71] Williams v. Mutual Gas Co., 52 Mich. 499; 18 N. W. Rep. 236; 50 Am. Rep. 266; 4 Am. and Eng. Corp. Cas. 66; Shepard v. Milwaukee Gas Co., 6 Wis. 539; 70 Am. Dec. 479; State v. New Orleans, etc., Co., 108 La. 67; 32 So. Rep. 179.

If the house is in possession of a tenant, the tenant and not the landlord must make the application and sign the contract; for only he can lawfully give permission to the servants of the gas company to enter the house, examine the meter and read the amount of gas consumed. Vanderberg v. Kansas City, etc., Co., 125 Mo. App. 600; 103 S. W. Rep. 17.

[72] Shiras v. Ewing, 48 Kan. 170; 29 Pac. Rep. 320.

[73] Shepard v. Milwaukee Gaslight Co., *supra*.

[74] Shepard v. Milwaukee Gaslight Co., *supra*.

[75] Shepard v. Milwaukee Gas Co., 6 Wis. 539; 70 Am. Dec. 479.

mercantile business in the city where the business is conducted, may authorize one of the clerks to make the demand for the merchant for a supply of gas in the city where such business is being carried on.[76] And a company cannot reject an application of a tenant on the ground that it had adopted a rule to deal only with the owner or his agent of the property to which gas is to be supplied.[77] Notice to supply gas, left with a person at the company's office at work around the office and behind the desk, where such person had attended to previous notices, and who testified that he was a clerk in the employ of the company, having charge of job work, surface work and the gas stove business, was held sufficient to bind the company, and render it liable to a penalty for failure to comply therewith.[78] It is a sufficient defense in a suit for damages incurred by reason of a failure to furnish gas that the plaintiff refused to sign the rules and regulations of the defendant, but that fact must be set up specially by answer. Yet the conduct of the gas company may have been such as to preclude such a defense; as where it has always rested its refusal on other grounds. In such an instance it waived all other defenses.[79] A written application or contract for gas cannot be varied by parol evidence. Thus where a contract for gas was expressly between a gas company and a husband, it was held that the wife could not vary its terms by oral testimony that he intended to make the contract in her own behalf.[79a]

[76] Shepard v. Milwaukee Gas Co., 11 Wis. 234.

[77] State v. Butte City Water Co., 18 Mont. 199; 44 Pac. Rep. 966; 32 L. R. A. 697; 56 Am. St. Rep. 574; 4 Am. & Eng. Corp. Cas. (N. S.) 238.

[78] Jones v. Rochester Gas, etc., Co., 7 N. Y. App. Div. 465; 39 N. Y. Supp. 1105.

In this case it was also held that a gas company is subject to separate penalties for a refusal to supply gas at the residence and also at the business office of an applicant, under a statute providing that if a gas company refuse or neglect to supply gas for ten days upon application therefor it shall forfeit and pay to the applicant the sum of ten dollars and the further sum of five dollars for every day during which the refusal or neglect continues. In this case it was also held that the consent of the applicant to the removal of the meter from the premises to be supplied during the controversy over his liability for a specified amount of gas would not prevent him from recovering the penalty.

[79] Shepard v. Milwaukee Gas Co., 11 Wis. 234. See Northern Colorado, etc., Co. v. Richards, 22 Colo. 450; 45 Pac. Rep. 423.

[79a] Vanderberger v. Kansas City

§ 613. Rules and regulations.

A gas company has the right to adopt rules and regulations under which it will supply its customers; but these rules must be reasonable and not impose an undue burden upon the customer.[80] Whether or not the rule or regulation is a reasonable one is a question for the court. All contracts are made subject to such rules.[81] A few instances of the reasonableness or the unreasonableness of rules and regulations have already been given; and other instances will be given hereafter. But it may be added that a rule providing that if a customer waste water, when not furnished by meter, his supply may be cut off, is a reasonable one;[82] and perhaps the same would be true if the water was furnished by meter, if the waste was so great that the company could not, by reason of such waste, supply its other customers with a sufficient supply. A rule providing that after gas has been admitted into a pipe, the pipes should be neither opened, extended, nor disconnected, whether they are opened, disconnected or extended for repairs or otherwise, without the company's permit, and if the rule in these particulars is violated the consumer would be required to pay triple damages, is invalid; for the company had no power to impose penalties and make a customer agree to the right to impose them if he violated this particular regulation. Another rule of the same company providing that it should have the right to shut off the gas, "in order to protect itself from fraud" was held void; for such a question falls within the province of the courts, to which

Gas Co., 125 Mo. App. 600; 105 S. W. Rep. 17.

[80] Louisville Gas Co. v. Dulaney, 100 Ky. 405; 38 S. W. Rep. 703; 36 L. R. A. 125; 6 Am. and Eng. Corp. Cas. (N. S.) 241; Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479; Portland Natural Gas Co. v. State, 135 Ind. 54; 34 N. E. Rep. 818; 21 L. R. A. 639; State v. Butte Water Co., 18 Mont. 199; 44 Pac. Rep. 966; 32 L. R. A. 697; 56 Am. St. Rep. 574; 4 Am. and Eng. Corp. Cas. (N. S.) 238; Williams v. Mutual Gas Co., 52 Mich. 499; 18 N. W. 236; 50 Am. Rep. 266; 4 Am. and Eng. Corp. Cas. 66; Harbison v. Knoxville Water Co., 103 Tenn. 421; 53 S. W. Rep. 993; Pocatello Water Co. v. Standley, 7 Idaho 155; 61 Pac. Rep. 518; Phelan v. Boone Gas Co., 147 Iowa 626; 125 N. W. Rep. 208; State v. Seattle, 60 Wash. 81; 110 Pac. Rep. 799.

[81] Shiras v. Ewing, 48 Kan. 170; 29 Pac. Rep. 320.

[82] Shiras v. Ewing, 48 Kan. 170; 29 Pac. Rep. 320.

the company must resort if it would protect itself. A still further rule provided that the company should have the right to enter the house at all times to examine the whole apparatus and to remove the meter and service pipes, and this was held invalid, because it was too general.[83] It is the duty of the company to inform a customer of its rules in order to bind him; but if he knows them it will not be necessary to inform him. It may be shown that he became aware of them by seeing them printed on bills presented to him.[84] A rule of a corporation supplying gas to the citizens of a city which requires owners of apartment houses in which it is necessary to install more than one meter to provide a separate meter room on each floor, or in the basement, where all meters may be installed, is reasonable where the evidence shows that the method provided for is more sanitary than to distribute meters throughout the various apartments; that there will be less danger of explosion in case of fire; that leaks in various pipes located throughout the building may be more readily found; that repairs in pipes serving the separate apartments may be made without interrupting the supply of gas to any apartment other than the one where the repair is needed; that collections from prepayment meters may be more readily made; and that the high city pressure not extending beyond the meters when installed may be confined to the main service pipes.[84a]

§ 614. Subscribing to rules and regulations.

If the rules and regulations of a company are reasonable, the company may require an applicant for gas to subscribe to them, or agree in writing to be governed by them,[85] and if he

[83] Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479.

[84] Brass v. Rathbone, 153 N. Y. 435; 47 N. E. Rep. 905; affirming 8 N. Y. App. Div. 78; 40 N. Y. Supp. 466; State v. Seattle Lighting Co., 60 Wash. 81; 110 Pac. Rep. 799.

A company may require the consumer to prepare his plumbing according to certain rules it has adopted, and to present a report and certificate of a plumber certifying that he had complied with its rules. State v. New Orleans, etc., Co., 108 La. 67; 32 So. Rep. 179.

[84a] State v. Seattle Lighting Co., 60 Wash. 81; 110 Pac. Rep. 799.

[85] Shepard v. Milwaukee Gaslight Co., 11 Wis. 234.

refuses it is not bound to furnish him gas. But if they are unreasonable, he is not bound to subscribe to them, nor agree to abide by them; and regardless of them he may maintain an action to compel the company to furnish him with gas.[86] In an application for a writ of mandamus to compel a company to supply gas, it must be averred that the applicant is ready to comply with all reasonable rules and regulations of the company; but if any of its rules are illegal, then such illegality must be especially set up and described, and an averment made that he is ready to abide by all the other rules of such company.[87] A company by insisting upon a customer to sign an application binding him to abide by illegal rules waives its right to insist that he failed to sign a proper application in an action against it for damages because of its failure to furnish gas.[88]

§ 615. Price to be charged.

If a statute or an ordinance fixes the price the company may charge for gas, such company cannot exceed the price named therein, although it may charge less, unless such statute or ordinance is invalid by reason of it having been enacted after the grant of the company's franchise, without any reservation to control the price of gas furnished. A contract with a municipality to furnish its citizens gas at not to exceed a certain

[86] Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 470; State v. Sedalia Gaslight Co., 34 Mo. App. 501; 84 Mo. 202; Andrews v. North River Electric Light, etc., Co., 23 Misc. (N. Y.) 512; 51 N. Y. Supp. 872; Shepard v. Milwaukee Gaslight Co., 11 Wis. 234.

[87] See State v. Consumers' Gas Trust Co., 157 Ind. 345; 61 N. E. Rep. 674; 55 L. R. A. 245; Portland, etc., Co. v. State, 135 Ind. 54; 35 N. E. Rep. 818; 21 L. R. A. 639.

The omission to aver in an action against a gas company for turning off the gas that plaintiff had complied with, or offered to comply with, the reasonable regulations of the defendant before or when it shut off the gas, is not supplied by an allegation, by way of conclusion and recital, that, after being tendered its charges therefor, the defendant wrongfully and unlawfully turned off the gas from plaintiff's property. Greenfield Gas Co. v. Trees, 165 Ind. 209; 75 N. E. Rep. 2.

[88] Shepard v. Milwaukee Gas Co., 11 Wis. 234; Shepard v. Milwaukee Gas Co., 15 Wis. 318; 82 Am. Dec. 679.

figure is one that a consumer within such municipality may enforce.[89] If the rates are not fixed, then the question is one common to any transaction of buying or selling;[90] although there are a number of cases which hold that the acceptance of a charter or franchise by a gas company contains an implied agreement that the rates made shall be reasonable in amount; usually, however, no effort is made to state what is or is not a reasonable rate.[91] In such rates there can be no discrimination;[92] not even by charging more for gas used for lighting than that used for heating or manufacturing.[93] Yet it has been

[89] Noblesville v. Noblesville Gas, etc., Co., 157 Ind. 162; 60 N. E. Rep. 1032; Wautauga Water Co. v. Wolfe, 99 Tenn. 429; 41 S. W. Rep. 1060; Wackenhut v. Empire Gas & El. Co., 166 N. Y. Supp. 29; Farnsworth v. Boro Oil & Gas Co., 216 N. Y. 40; 109 N. E. 860; Pond v. New Rochelle Water Co., 183 N. Y. 330; 76 N. E. 211; 1 L. R. A. (N. S.) 985; 5 Ann. Cas. 504; Farnsworth v. Boro Oil & Gas Co., 76 Misc. 37; 134 N. Y. Supp. 348; Henderson v. Shreveport Gas, etc., Co., 134 La. 39; 63 So. 616.

It has been held that the city may sue to enjoin the stoppage of supply where the refusal to furnish at a fair price is unreasonable. Public Service Gas Co. v. Newark, 89 N. J. Ch. 384; 98 Atl. 404; St. Marys v. Hope Natural Gas Co., 71 W. Va. 76; 76 S. E. 841; Gainsville Gas, etc., Co. v. Gainsville, 63 Fla. 425; 58 So. 785 (to prevent a multiplicity of suits). But the city cannot maintain an action against the company to recover overcharges to consumers. Newport v. Municipal Light Co., 147 Ky. 775; 145 S. W. 1107.

A company's franchise with a city provided that the company should not charge a higher rate than 90 cents per 1,000 cubic feet for gas, and that every consumer should be entitled to a discount of 10 cents per 1,000 cubic feet upon prompt payment. It was held that the franchise entitled the company to charge 80 cents for gas. Boerth v. Detroit City Gas Co., 152 Mich. 654; 116 N. W. Rep. 628.

[90] See Noblesville v. Noblesville Gas Co., 157 Ind. 162; 60 N. E. Rep. 1032; Philadelphia Co. v. Park, 138 Pa. St. 346; 22 Atl. Rep. 86.

[91] Cincinnati, etc., R. R. Co. v. Bowling Green, 57 Ohio St. 336; 49 N. E. Rep. 121; People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406; Toledo v. N. W. Ohio Natural Gas Co., 8 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531; Public Service Gas Co. v. Newark, 86 N. J. Ch. 384; 38 Atl. 404; Egyptian Packing Co. v. Olney Gas Co., 183 Ill. App. 447; Granville v. Crawford Gas & Fuel Co., 34 Ohio Cir. Ct. 256.

[92] Griffin v. Goldsboro Water Co., 126 N. C. 206; 30 S. E. Rep. 319; 41 L. R. A. 240; People's Gaslight and Coke Co. v. Hale, *supra;* Bellaire Goblet Co. v. Findlay, 5 Ohio Cir. Ct. Rep. 418; Dalzell v. Findlay, 5 Ohio Cir. Ct. 435; 3 Ohio Cir. Dec. 214; affirmed 27 Wkly. L. Bull. 128; Egyptian Packing Co. v. Olney Gas Co., 183 Ill. App. 447.

[93] Bailey v. Fayette Fuel Gas Co., 193 Pa. St. 175; 44 Atl. Rep. 251; 44 W. N. C. 505; 11 Am. and Eng.

held that a substantial dissimilarity in equipment for consumption of natural gas as a fuel for heating hotels warrants a reasonable diversity in rates if the same rate is offered to all hotels similarly equipped.[93a] And a gas company may classify its patrons and charge different rates for each character of service, if its classification is just and the rate not discriminatory. An undue preference results only from allowing one person what the company denies another, under substantially the same conditions. Any fact which produces a substantial inequality of condition justifies a gas company in making a reasonable commensurate inequality of charges.[93b] Nor can the company make a special rate to those owning an interest in it.[94] But it has been held that a gas company may charge one rate in a neighborhood where it comes in competition with another company; and a higher rate where there is no competition, so long as the latter rates do not exceed the rate allowed by a statute. It is said a reasonable price paid by one is not made unreasonable because another pays less.[95] Where the ordinance by which a gas company gains admission to lay its mains in the street and supply the citizens of the municipality provides that gas shall be furnished to consumers upon such terms and conditions as the common council may thereafter determine, a duty is imposed upon the company to agree with the council on reasonable terms; and if the duty be disregarded, the court may compel obedience to the ordinance by a mandatory injunction.[96] Under a contract to furnish gas "at two-thirds of

Corp. Cas. (N. S.) 740; Richmond Natural Gas Co. v. Clawson, 155 Ind. 659; 58 N. E. Rep. 1049; 51 L. R. A. 744; Bellaire Goblet Co. v. Findlay, *supra;* Dalzell v. Findlay, *supra;* Cincinnati, etc., R. R. Co. v. Bowling Green, 57 Ohio St. 336; 49 N. E. Rep. 121; Egyptian Packing Co. v. Olney Gas Co., 183 Ill. App. 447.

93a Elk Hotel Co. v. United Fuel Gas Co., 75 W. Va. 200; 83 S. E. 922.

93b Elk Hotel Co. v. United Fuel Gas Co., 75 W. Va. 200; 83 S. E. 922. See § 619.

94 Crescent Steel Co. v. Equitable Gas Co., 23 Pittsb. Leg. J. (N. S.) 316.

95 Baltimore Gas Co. v. Colliday, 25 Md. 1.

96 Toledo v. N. W. Ohio Natural Gas Co., 8 Ohio S. and C. P. Dec. 277; 6 Ohio N. P. 531.

In this case the petition for an injunction was held defective, it only stating that the council passed an ordinance fixing the price at reasonable rates which the company refused to recognize and was proposing to furnish gas at a price in excess of that named in the ordi-

the lowest average price at which gas shall or may be furnished" in five specified cities, it was held that the price must be determined by adding the five lowest cash prices in those cities, divide the sum total by five, and multiply the result by two-thirds.[97] The rate to be paid must be measured by the rate maintained in cities thus named, not at the time of the adoption of the ordinance, but with the fluctuation of rates in such cities. Thus in Illinois where the gas to be furnished was to be "of a quality at least equal to, and rates favorable as that furnished by" a certain company, it was held that the rate of that company at the time of the furnishing of the gas should be taken, and not its rate at the time of the passage of the ordinance. Therefore, the rates fluctuated with the rates of such company, and were really subject to its control.[98] And in Massachusetts where an ordinance provided that the gas should be furnished as cheaply as it was furnished in Boston, New York and Baltimore, it was held that it was not intended that the company should at all times furnish it as cheaply as it was being furnished in those cities at the time the ordinance was passed, but that the rate should vary with the rates in those

nance. Nothing was alleged that the company had not agreed with the council on a schedule, nor that the council had proposed one to the company, nor that the company had refused to negotiate with the council.

[97] Cincinnati v. Cincinnati Gaslight and Coke Co., 53 Ohio St. 278; 41 N. E. Rep. 239.

In its franchise a gas company agreed to furnish illuminating gas at not less than 16 candle power, at $1.10 per thousand cubic feet, less discount, and fuel gas of 452 heat units per cubic foot, at $1.00 per thousand cubic feet, less a discount, and that in case a lower rate was made to either of two designated towns, the price in the city should be the same as so reduced. At that time the company furnished artificial gas to those two towns, but later one of the towns granted a franchise for natural gas at greatly reduced rates. Natural gas has from 5 to 7 candlepower and 1,000 heat units per cubic foot. It was held that the franchise referred only to artificial gas, and the company could not be compelled to reduce its rates, and the city could not compel it to furnish natural gas except in pursuance to another franchise. Union Light, etc., Co. v. Young, 146 Ky. 430; 142 S. W. 692.

[98] Decatur Gaslight and Coke Co. v. Decatur, 120 Ill. 67; 11 N. E. Rep. 406; affirming 24 Ill. App. 544. At the time of the adoption of the ordinance the rate of the company referred to was over $3.25 per thousand feet, but afterwards it reduced its rate to $1.50, and it was held that the city was not liable to pay any higher price than the reduced rate.

cities.[99] Where a gas company in accepting an ordinance fixing the rates to be charged consumers expressly reserved all vested rights under its franchise, one of the provisions thereof being its right to fix its own prices, within reasonable limits, for gas, such reservation was held to apply to all uses of gas not specified in the last ordinance.[100] Where, under a special contract, a manufacturing company was supplied natural gas for fuel only, but used it for illuminating purposes also, it was held liable for the reasonable value of the gas used for the latter purpose, without regard to the price paid for that used for fuel.[101] If an ordinance regulating the price of gas be amended so as to increase the price to be charged by a particular gas company only for a certain time, such amendment does not repeal the amended ordinance, and on the expiration of such time the prior ordinance is in force and prevails.[102] If the company sees fit to supply gas at a lower rate than it is entitled to charge for it, or furnishes a gas of a better quality for fuel purposes than it is required to do, or if the same quality is

[99] Worcester Gaslight Co. v. Worcester, 110 Mass. 353; Cincinnati v. Cincinnati Gaslight and Coke Co., 53 Ohio St. 278; 41 N. E. Rep. 239.

It must be alleged in the complaint by a water company to have an ordinance fixing water rents to be paid by citizens declared void because in violation of an agreement with it that the rates to be fixed by the municipality should not be less than the prices charged in towns of the State similarly situated, that there is a substantial difference between the rates as fixed and those obtaining in the towns to which reference is made; and it is not sufficient to merely allege that the respective rates do not correspond, without showing wherein or to what extent there is a difference. Leadville Water Co. v. Leadville, 22 Colo. 297; 45 Pac. Rep. 362.

[100] Noblesville v. Noblesville Gas Co., 157 Ind. 162; 60 N. E. 1032. The court seems to have overlooked the fact that by such a construction of the two ordinances it adopted a rule which discriminated, or might lead to discrimination, between consumers, a thing forbidden by the general principles of the law.

[101] Philadelphia Co. v. Park, 138 Pa. St. 346; 22 Atl. Rep. 86.

[102] Thistlethwaite v. State, 149 Ind. 319; 49 N. E. Rep. 156.

An application for water, subject to the rules and ordinances of the municipality, constitutes an express consent by the applicant to pay the rates charged. Silkman v. Yonkers Water Comrs., 152 N. Y. 327; 46 N. E. Rep. 612; 37 L. R. A. 827; Rieker v. Lancaster, 7 Pa. Super. Ct. 149; 42 W. N. C. 160; Lancaster Hotel Co. v. Lancaster, 7 Pa. Super. Ct. 159; 42 W. N. C. 164. But this is not the case if the rates are discriminating or unreasonable. Griffin v. Goldsboro Water Co., 122 N. C. 206; 30 S. E. Rep. 319.

furnished for fuel purposes that it is required to furnish for illuminating purposes, when it is under no obligation to furnish it of so high a quality for fuel purposes,—that does not prevent it charging the full rate, or changing the supply for fuel purposes from the higher to the lower quality.[103] It is proper for a gas company to provide that if gas bills are not paid within a certain time after due,—as within ten days,—a small percentage will be added.[104] And so it may insist upon an agreement that if a bill for gas is not paid within ten days the flow of gas may be estopped.[104a]

[103] People's Gaslight and Coke Co. v. Hale, 94 Ill. App. 406.

[104] Tacoma Hotel Co. v. Tacoma Light and Water Co., 3 Wash. St. 316; 28 Pac. Rep. 516; Bower v. United Gas Imp. Co., 37 Pa. Super. Ct. 113.

A city ordinance fixing gas rates and prohibiting the collection, by rebate, drawback, or other device, of a greater or less or different sum than the rates fixed prohibits a gas company from granting a discount to consumers paying their bills at its office on or before a designated day of the month, next succeeding that during which the indebtedness was incurred. Economic Gas Co. v. Los Angeles, 168 Cal. 448; 143 P. 717.

For a case where natural gas was to be furnished under a certain pressure, see Addleman v. Manufacturers' L. & H. Co., 255 Pa. 580; 100 Atl. 446.

The company cannot add a charge of one dollar for turning on the gas where it has been turned off for failure to pay a bill, if the bill is paid and a request made that it be turned on again. American W. W. Co. v. State, 46 Neb. 194; 64 N. W. Rep. 711.

The assignee of a gas company's rights to furnish the inhabitants of a municipality gas, is bound by the agreement of the assignor to furnish gas for the streets and the municipal public buildings free of charge. Freeport School District v. Enterprise Natural Gas Co., 18 Pa. Super. Ct. 73.

A company cannot increase the charge for gas supplied so as to cover the amount of a meter rent, where a statute forbids a meter rent. Buffalo v. Buffalo Gas Co. (N. Y.), 80 N. Y. Supp. 1093.

[104a] Bower v. United Gas Imp. Co., 37 Pa. Super Ct. 113; State v. Board, 105 Minn. 472; 117 N. W. Rep. 827.

Demurrer lies to the petition of a municipality to enjoin a gas company, after the exercise of its franchise for 10 years, from charging prices to consumers to excess of the maximum metered and flat rate prices fixed by ordinance for the ensuing term and from shutting off gas to consumers refusing to pay the minimum metered only rate declared by the company. Granville v. Crawford Nat. Gas & Fuel Co., 34 Ohio Cir. Ct. R. 256.

Where the creditors of the gas company, which was being operated by a receiver, consented to its ex-

§ 616. Payment in advance.

Where gas is not furnished by meter measurement, and is furnished at so much per month, quarter or year, upon what is known as the "flat" rate, the company may require that it be paid for in advance; and a rule requiring payment in advance for three months is a reasonable one.[105] On an issue whether water rent was payable in advance, the transactions of the company and the consumer may be shown, to reveal their understanding as to the time when the payments were to be made.[106] In a case where it is necessary to make a tender,—the rent being payable for the quarter in advance,—such tender will not be rendered invalid by failure to tender a fee charged for

penditure of certain sums from its annual earnings for extensions and betterments, on condition that the property be operated at compensatory rates, the customers of the company are entitled to have such expenditures made to the extent necessary to supply them with gas at reasonable rates, before payments are made on the principal of the company's debts. Landon v. Public Utilities Commission, 234 Fed. Rep. 152.

Where one natural gas company agrees, in writing, to sell another natural gas company gas at the rate of ten cents per 1,000 cubic feet, and the contract provides that "the above price is made on the minimum consumption of 10,000,000 cubic feet per month," the contract, as properly construed, entirely fails to fix a price for the gas, if the amount delivered is less than 10,000,000 cubic feet per month, and the supplying company is not entitled to recover $1,000 for a month in which it supplied only 500,000 cubic feet, but is entitled to the market value of the quantity actually delivered. Monongahela Nat. Gas Co. v. Ellwood Nat. Gas & Oil Co., 43 Pa. Super. Ct. 619.

[105] Harbison v. Knoxville Water Co., 103 Tenn. 421; 53 S. W. Rep. 993; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa 426; 120 N. W. Rep. 966.

The company is not bound to exhaust the deposit, if the bills be delinquent, before shutting off the gas. Hewsey v. Queens Borough Gas & El. Co., 47 N. Y. Misc. Rep. 375; 93 N. Y. Supp. 1114.

[106] Hieronymus v. Bienville Water Supply Co., 131 Ala. 447; 31 So. Rep. 31.

In England where a statute requires water rents to be paid in advance, no penalty is incurred for a failure to furnish water unless a payment in advance is made or tendered, even if the company is in the habit of supplying water without such advanced payment. Kyffin v. East London W. W. Co., 66 Gas. Jr. 243; Thorn v. East London W. W. Co., 66 Gas. Jr. 189; Sheffield W. W. Co. v. Brooks, 8 Q. B. Div. 632; 51 L. J. M. C. 97; 30 W. R. 889; 46 J. P. 548. See Houlgate v. Surrey Consumers' Gas Co., 8 Gas J. 261.

turning on the gas, if the company refuse to receive the sum tendered solely upon non-payment of an illegal charge. In such a case it waives a tender of the fee.[107]

§ 617. Deposits.—Interest on deposits.

It is reasonable regulation to require an applicant for gas to make a deposit of a sum of money to secure the payment of rates, before gas shall be furnished.[108] But a company cannot require a particular person to make a deposit, when no regulation of a general character has been adopted.[109] The sum of two pounds has been held a reasonable sum to demand;[110] and so one hundred dollars, where sixty dollars' worth a week was consumed.[111] Where the applicant for gas paid the amount demanded and immediately demanded it back, it was held that the company was justified in refusing him gas.[112]

[107] Northern Colorado, etc., Co. v. Richards, 22 Colo. 450; 45 Pac. Rep. 423.

If gas consumers be legally bound to pay an advanced price of gas on all gas consumed after they are notified that the advanced price has gone into effect, so that they owe for the difference in the price, which would have been collected on the 1st of the succeeding month under a contract, an act of a gas company in arbitrarily turning off the gas before that time for nonpayment of the difference between the old and new rates is a tortuous act. Carson v. Ft. Smith Light & Traction Co., 108 Ark. 452; 158 S. W. 129.

[108] Williams v. Mutual Gas Co., 52 Mich. 499; 18 N. W. Rep. 236; 50 Am. Rep. 266; 4 Am. and Eng. Corp. Cas. 66; Ford v. Brooklyn Gaslight Co., 3 Hun 621; Shepard v. Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479; Wright v. Colchester Gas Co., 30 Gas. J. 336; Vanderberg v. Kansas City Gas Co., 126 Mo. App. 600; 105 S. W. Rep. 17; Pollits v. Consolidated Gas Co., 118 N. Y. App. Div. 92; 102 N. Y. Supp. 1116; Bienenfeld v. Consolidated Gas Co., 119 N. Y. App. Div. 855; 103 N. Y. Supp. 1116; Pawhuska Oil & Gas v. Pawhuska, 47 Okl. 342; 148 Pac. 118 ($5 deposit).

The gas company is not prohibited from cutting off the supply of gas for failure to pay rent until the amount of the deposit has been exhausted. Hewsey v. Queens Borough Gas & El. Co., 47 N. Y. Misc. Rep. 375; 93 N. Y. Supp. 1114. And if an applicant be in arrears it may refuse to accept his deposit and furnish gas until he pays up such arrears. State v. Board, 105 Minn. 472; 117 N. W. Rep. 827.

[109] Owensboro Gaslight Co. v. Hildebrand, 19 Ky. Law Rep. 983; 42 S. W. Rep. 351.

[110] Samuel v. Cardiff Gas Co., 18 Gas. J. 192.

[111] Williams v. Mutual Gas Co., *supra*.

[112] Littlewood v. Equitable Gas Co., 8 Gas. J. 541.

So where a consumer refuses to pay only so much of his bill as exceeded the deposit, because the company would not pay him interest upon it; and upon payment of such excess the company demanded from him a new deposit,—he in his contract agreeing to make a deposit,—it was held that, on his refusal to make it, it was justified in shutting off his gas supply.[113] If the periodical gas bills greatly exceed the amount of the deposit, the company may demand that such deposit be increased; as where the deposit was fifteen dollars and the monthly gas bill forty-five. A request for the payment of the bill and an increase of the deposit at the same time does vitiate the demand for the increase.[114] If a company accept security in place of a deposit, it waives its right to such deposit, as where the company took the plaintiff's demand note for the amount of the deposit, and immediately demanded its payment, the applicant requesting a short delay in payment, it was held that it was an illegal act to at once cut off his supply of gas, for the security still existed.[115] It has been held that the question whether or not the deposit was a reasonable one was one for the jury.[116] The consumer has the burden to show that the deposit is unreasonable.[117] A gas company may require the charges to be paid in advance for a reasonable term or be secured by a deposit; and

[113] Wright v. Colchester Gas Co., 30 Gas. J. 336.

[114] Ford v. Brooklyn Gaslight Co., 3 Hun 621.

[115] Fowler v. Chartered Gas Co., 17 Gas. J. 908.

A few cases hold that unless the company's charter or a statute give it the right to insist upon a deposit, the company cannot demand it. Spratt v. South Metropolitan Gas Co., 7 Gas. J. 663. The payment of a water license under a threat to turn off the water in case of continued refusal, is a payment under compulsion; and if the charge is excessive, the excess may be recovered back without tendering the amount really due. Westlake v. St. Louis, 77 Mo. 47.

[116] Bennett v. Eastchester Gaslight Co., 40 N. Y. App. Div. 169; 57 N. Y. St. Rep. 847.

[117] Bennett v. Eastchester Gaslight Co., *supra*.

A company cannot refuse to supply gas to a married woman unless she pay her husband's debt to it. Vanderberg v. Kansas City Gas Co., 126 Mo. App. 600; 105 S. W. Rep. 17.

A gas consumer refused to pay gas charges, because of a mix-up in accounts, and the gas meter was taken out and the supply cut off. Thereafter the consumer was the successful party in a suit to recover the disputed amounts. It was a rule of the company to exact of unknown or irresponsible persons a deposit to cover charges made. The gas

may enforce such requirement by a refusal of service to persons who do not comply with it. The gas company must pay interest on the deposit.[117a]

§ 618. Discrimination in use.—Rates.

One rate cannot be adopted for those who use natural gas for light and another for those who use it for heat. The rate for both purposes must be the same. Thus where the rate for heat alone was fixed by the company at twelve and a half cents per thousand feet, and for both heat and light at twenty cents, the rule of the company was held to be unreasonable and invalid. It was contended by the company that it was not shown that natural gas for illuminating purposes was of less value than it was for fuel, or that when used both for light and fuel it was not reasonably worth twenty cents; and for this reason it claimed that it had made no unjust discrimination against the complaining consumer. The record did not disclose how many feet the plaintiff had used for light and how many for fuel, and because of this fact it was contended that it could not be claimed there had been any discrimination as far as he was concerned.

company refused to again connect the meter, and in mandamus to compel it to do so set up the rule of deposit, which the consumer had refused to comply with. It was held that where the real reason of refusal was spite, induced by the suit, and not a *bona fide* reliance on the rule, the company would be compelled to furnish the gas without an advance deposit. Phelan v. Boone Gas Co., 147 Iowa 626; 125 N. W. Rep. 208.

Under the rule of a gas company requiring an advance deposit from irresponsible persons to cover charges made, in the absence of evidence to the contrary, it will be presumed that the consumer was responsible. *Id.*

Under the New York Transportation Corporations Law, Secs. 63, 65, a gas company may disconnect a customer's meter where he refused to increase his deposit, so that it would approximately secure payment of the amount of gas to be used in the course of two months. Sling v. Central Union Gas Co., 144 N. Y. Supp. 740.

A gas company which accepted a franchise ordinance fixing maximum rates and authorizing gas to be shut off from any consumer in arrears for more than 15 days could not require a $5 deposit or add a penalty of 5 cents per 1,000 cubic feet for nonpayment by a certain time in the month. Columbus v. American Gas Co., 149 Pac. 402; 96 Kan. 367; L. R. A. 1915, F. 1180.

[117a] Union L. H. & P. Co. v. Mulligan (Ky.), 197 S. W. 1081.

The court brushed aside these contentions as without merit; for the reason that the classification of customers was arbitrary and unjust. "Under this rule," said the Court, "appellant [the gas company] did not profess to have any regard or consideration for the amount consumed for light. If any patron, using gas for heating his dwelling, also employed one jet about his dwelling whereby a small amount of natural gas was consumed each month for light, he was amenable and subject to the rule in like manner as the fuel consumer would be who used many jets about his premises for illuminating purposes. The amount consumed for light does not seem to be a feature of any importance within the meaning of the rule in question. Such a regulation, under the facts in this case when tested by the principle affirmed and sustained by the authorities, must certainly be held unreasonable, arbitrary and unjust." [118] So a gas company incorporated to furnish heat and light cannot prescribe one price for gas used for heating and another for gas used for lighting, and that the price for gas for lighting should be measured by what the consumer would have to pay for a substitute, if gas could not be had.[119]

§ 619. Classification of customers.— Rates.

The Indiana Supreme Court seems to consider that a gas company has the right to classify its customers, and base its charges upon the classification, as indicated in the following

[118] Richmond Natural Gas Co. v. Clawson, 155 Ind. 659; 58 N. E. Rep. 1049; 51 L. R. A. 744.

The court distinguishes this case from Philadelphia Co. v. Park, 138 Pa. S. 346; 22 Atl. Rep. 86, by saying that it was a case where the gas company had agreed to furnish the defendant with gas for fuel only at a low price, but the company having taken gas from the mains for lighting purposes, it was liable to pay the market value for the amount of gas used in lighting, which was much higher than the agreed price of gas for fuel only.

[119] Bailey v. Fayette Fuel Gas Co., 193 Pa. St. 175; 44 Atl. Rep. 251; 44 W. N. C. 505.

A statute forbidding a higher rate for water for "domestic purposes" than that specified for the use of water for a building, includes all uses which contribute to the health, comfort, and convenience of a family in the enjoyment of their dwelling as a home. Crosbey v. Montgomery, 108 Ala. 498; 18 So. Rep. 723. See where a gas company agreed to pay a city one-fifth of the net profits from the sale of gas for "domestic purposes."

language: "Counsel for the appellee concedes, and properly so, we think, that companies engaged in furnishing gas and water, etc., to the public may make classification in respect to their patrons or consumers and adopt reasonable rules and regulations for the control of such classes, but that the classification must be reasonable and impartial, and not arbitrary or unjust, of a discriminating character; but that due regard must be had to the rights of the citizens of the town or city depending upon such companies for their supply of water or gas, as the case may be, and that all occupying similar or like positions must be treated impartially." [120] In the case from which this quotation is made, the company had one rate for the manufacturer using its natural gas, and another for his residence and residences in general. But this rule was not drawn in question, and of course not passed upon. Whether or not such a rule is valid is not yet decided so far as the author knows; but it is difficult to see why, in accordance with the commercial practice of the day, a large consumer should not receive gas at a lower rate than a smaller one, all other things being equal.[121]

§ 620. Recovering back overcharges.

A consumer who pays an overcharge or illegal bill does not necessarily voluntarily pay it. In a measure he is under compulsion; for if he do not pay, his gas will be cut off, and his premises left without means of lighting. The gas company cannot claim successfully that the payment was voluntarily made, and thus retain the money: for it is public duty it was bound to perform at a lower price. The excess, therefore, paid over the amount of the legal rate may be recovered back, under the theory that it was a payment under compulsion.[122] In the

[120] Richmond Natural Gas Co. v. Clawson, 155 Ind. 659; 58 N. E. Rep. 1049; 51 L. R. A. 744. See § 615, notes 93a and 93b.

[121] See St. Louis Brewing Ass'n v. St. Louis (Mo.), 37 S. W. Rep. 525; Sheward v. Citizens' Water Co., 90 Cal. 635; 27 Pac. Rep. 439. See State v. Goswell (Wis.), 93 N. W. Rep. 542.

[122] Pingree v. Mutual Gas Co., 107 Mich. 156; 65 N. W. Rep. 6; Penn. Iron Co. v. Lancaster, 17 Lanc. Law Rev. 161 (must pay under protest); Indiana, etc., Co. v. Anthony, 26 Ind. App. 307; 58 N. E. Rep. 868.

case just cited first below an ordinance prescribed the rate, and a recovery back of the excess was allowed, although such ordinance did not in terms confer a right of action to recover such excess. In this case the consumer paid the bill in ignorance of the legal rate. The ordinance provided that the legal rate should be the average rate in five certain cities, and it was held that the payment was not voluntary, though the consumer was negligent in not ascertaining such average rate.[123]

§ 621. Collection of rents.— Action.

A gas company may provide that if its bill for rent is not paid within so many days, an additional amount will be exacted, — as if not within ten days, five per cent. will be added; but a provision also providing that if the bill is not paid within two months, the attachment will be cut off and not renewed until the rent due, including all expenses of cutting and turning on, and the rent, in case of a water company, for half a year be not paid, is void.[124] The gas company may maintain *assumpsit* to collect bills for gas furnished;[125] and if furnished to a partnership, although the premises are owned by only one of the partners, all are liable.[126] A surety for gas furnished is liable with the consumer, but not for a tenant succeeding to the person for whom he became responsible.[127] Where a receiver of the profits of a partnership agreed in writing, with the consent of the partners, to pay a back bill then due within six months,

[123] In England it is held that a private consumer cannot recover an overcharge made contrary to a statute providing that under certain circumstances the price of gas supplied a municipality by a gas company should be reduced, and empowering the corporation to check the annual audit of the company's accounts to ascertain if it is complying with the statute. Johnston v. Consumers' Gas Co., 78 Law T. 270; [1898] A. C. 447; 67 L. J. P. C. 33.

An unlawful charge for a meter may be recovered back. Capitol City Gas, etc., Co. v. Gaines, 20 Ky. L. Repr. 1464; 49 S. W. Rep. 462. As to right of city to recover it for a consumer, see § 615, note 89.

[124] Dayton v. Quigley, 29 N. J. Eq. 77.

[125] London Gaslight Co. v. Nicholls, 2 Car. and P. 365; Preston v. Hayton & Roby Gas Co., 25 Gas. J. 889; Birmingham, etc., Co. v. Ratcliffe L. R. 6 Ex. 224; Hieronymus v. Bienville Water Supply Co., 131 Ala. 447; 31 So. Rep. 31.

[126] London Gaslight Co. v. Nicholls, *supra*.

[127] Manhattan Gaslight Co. v. Ely, 39 Barb. 174.

and also undertook to pay future bills until further notice; it was held that he was liable for the past bills, the consideration being sufficient to enable the gas company to maintain *assumpsit*.[128]

§ 622. Collection of rents by distress.

In some instances early statutes allowed gas companies to collect rents by distress. But distress does not lie when that rule prevails, for a gas stove let for hire to the consumer by the company.[129] And where a gas company was authorized by statutes to levy all sums for gas by distress, after one of its customers had filed a petition in bankruptcy, it was held that the company could not then collect the gas by distress.[130] This case was distinguished from an earlier case, in which a statute authorized a company to collect rent and charge for gas "by the same means as landlords are by law empowered to recover rent in arrear," where the court held that the rent or charges in arrear before the petition in bankruptcy was filed could be collected by distress of the goods of the bankrupt in the trustee's hands.*[130] Subsequently, however, under a similar statute, the right to relief by distress was denied.[131]

[128] Hiberian Gaslight Co. v. Parry, L. R. 4 Ir. 453.

If a lessor agree to pay "all water rates imposed or assessed upon the premises or on the lessor or lessees in respect thereof," he is not bound to pay for water supplied to the lessees for trade purposes. *In re* Floyd [1897], 1 Ch. 633; 66 L. J. Ch. 350; 76 L. T. 251; 45 W. R. 435.

Where a gas company covenanted to supply gaslight for each lantern of a parish, to the satisfaction of the defendant or its surveyor, in a certain manner and form set out in the contract, it was held that the parish could not refuse to pay for the gas on the ground that the company did not light the lanterns to the satisfaction of the defendant or its surveyor and did not perform the other covenants of the contract, — the performance of all the several stipulations of the gas company not being a condition precedent to the right to receive the money. London Gaslight Co. v. Vestry of Chelsea, 8 C. B. (N. S.) 215; 9 Gas J. 292.

[129] Gaslight and Coke Co. v. Hardy, 17 Q. B. Div. 619.

[130] *Ex parte* Hill, 6 Ch. Div. 63.

*[130] *Ex parte* Birmingham, etc., Co., L. R. 11 Eq. 615 (and see *ex parte* Birmingham, etc., Co., L. R. 11 Eq. 204).

[131] *Ex parte* Harrison, 13 Q. B. Div. 753.

§ 623. Shutting off gas for failure to pay.

If a consumer fails or refuses to comply with the rules or regulations of a gas company, such company, after bringing his attention to the rule violated, may shut off his supply of gas if he continues to violate it after notice given.[132] Thus a rule that a consumer's supply of gas may be shut off if he becomes in arrears and fails to pay upon demand made, is valid, and in such an instance, after notice given, the company may shut off his gas supply.[133] And if a consumer has practically abandoned the use of gas, by adopting other methods of lighting, the company may cut off his supply of gas.[134] But a company cannot shut off a tenant's or landowner's gas because a former occupant or owner of the building has failed or refused to pay proper gas bills.[135] This rule, however, may be changed by a statute, or by a contract, or by an ordinance where the municipality furnishes gas to private consumers. Thus it was held

[132] Shiras v. Ewing, 48 Kan. 170; 29 Pac. Rep. 320; Commonwealth v. Philadelphia, 132 Pa. St. 288; 19 Atl. Rep. 136 (as a rule requiring bills to be paid within ten days after presented, or the gas would be shut off).

[133] The right to shut off the gas exists in such an instance without such a rule. People v. Manhattan Gaslight Co., 45 Barb. 136; 30 How Pr. 87; 1 Abb. Pr. (N. S.) 404; Smith v. Scranton Gas and Water Co., 5 Lack. Leg. N. 235; Baltimore Gaslight Co. v. Colliday, 25 Md. 1; Appeal of Brum (Pa.), 12 Atl. Rep. 855; Morey v. Metropolitan Gaslight Co., 38 N. Y. Super. 185; Bellaire Goblet Co. v. Findlay, 3 Ohio C. Dec. 205; 5 Ohio Cir. Ct. 418; McDaniel v. Springfield W. W. Co., 48 Mo. App. 273; Mackin v. Portland Gas Co., 38 Ore. 120; 61 Pac. Rep. 134; 62 Pac. Rep. 20; 49 L. R. A. 596; Tacoma Hotel Co. v. Tacoma Light and Water Co., 3 Wash. 316; 28 Pac. Rep. 516; 14 L. R. A. 669; Pearson v. Phœnix Gas Co., 12 Gas. J. 69; Jenkins v. Columbia, etc., Co., 13 Wash. 502; 43 Pac. Rep. 328; State v. Board, 105 Minn. 525; 117 N. W. Rep. 827; Hitchcock v. Essex & H. Gas Co., 71 N. J. L. 565; 61 Atl. Rep. 397; Bower v. United Gas Co., 37 Pa. Super. Ct. 113.

A gas company cannot refuse to furnish gas to a married woman on the ground that her husband owes it for gas. Vanderberg v. Kansas City, etc., Co., 125 Mo. App. 600; 105 S. W. Rep. 17.

[134] Adams Express Co. v. Cincinnati Gaslight Co., 10 Ohio Dec. 389; 21 Wkly. Law Bull. 18. See Smith v. Capital Gas Co., 132 Cal. 209; 64 Pac. Rep. 258.

[135] Sheffield W. W. Co. v. Wilkinson, L. R. 4 C. P. Div. 410; People v. Manhattan Gaslight Co., *supra;* Merrimac River Savings Bank v. Lowell, 152 Mass. 556; 26 N. E. Rep. 97; New Orleans Gaslight Co. v. Paulding, 12 Rob. (La.) 378; Dayton v. Quigley, 37 N. J. Eq. 77; Gaslight and Coke Co. v. Mead, 45 L. J. M. 71; Brass v. Rathbone, 8 App. Div. N. Y. 78; 40 N. Y. Supp. 466; affirmed 153 N. Y. 435; 47 N. E. Rep. 905; Turner v. Revere Water Co., 171 Mass. 329; 50 N. E. Rep. 634; Morey v. Metro-

that the city of Philadelphia, when it furnished gas, could adopt an ordinance and require payment of all arrear gas bills of former tenants of the premises before supplying present tenants.[136] A statute may make the charge for gas supplied a lien on the land, in which event the purchaser of the land will be bound to pay up all arrearage bills, even though such purchaser obtain title through a sheriff's sale.[137] In such an instance a statute is necessary to make the rent a lien,[138] unless a contract the equivalent of a mortgage be given.[139] But where a statute authorized a company "to stop the gas from entering the premises, service pipes or lamps of any" person refusing to pay for gas supplied, the company was held empowered to cut off the gas supplied to one set of premises of a consumer for default made by him in respect to another set of premises; it being deemed that the liability attached to the consumer and not to the premises.[140] A receiver appointed by court in behalf of the bondholders and carrying on the business, is not entitled to gas, under a statute authorizing a company to turn off the gas if the owner of the premises does not pay, without paying the arrears of the company for which he was appointed receiver; but even here there may be exceptions.[141] But a contract to supply gas, and permitting the company to shut off the supply if bills be not paid as to any premises of the con-

politan Gas Co., 6 Jones & S. (N. Y.) 185; Hoch v. Brooklyn, etc., Gas Co., 117 N. Y. App. Div. 882; 103 N. Y. Supp. 370.

Where a statute allowed a gas company to shut off the supply of gas because bills were not paid, but forbade a refusal to furnish gas merely because a bill for gas remained unpaid by a previous occupant of the building or premises, it was held that an assignment for the benefit of creditors worked a change of ownership, not only in the legal title, but in the interests represented by it, and the company could not refuse to furnish gas to the assignees because the bills for gas incurred by a previous occupant remained unpaid. Cox v. Malden, etc., Co., 199 Mass. 324; 85 N. E. Rep. 180.

136 Commonwealth v. Philadelphia, 132 Pa. St. 288; 19 Atl. Rep. 136; 46 Leg. Int. 210.

137 Appeal of Brumm (Pa.), 12 Atl. Rep. 855.

138 Turner v. Revere Water Co., 171 Mass. 329; 50 N. E. Rep. 634.

139 St. Joseph Hydraulic Co. v. Wilson, 133 Ind. 465; 33 N. E. Rep. 113.

140 Montreal Gas Co. v. Cadieux, 68 L. J. P. C. 126; [1889] App. Cas. 589; 81 Law T. (N. S.) 274; Montreal Gas Co. v. Cadieux, 11 Can. Q. B. 93.

141 Patterson v. Gaslight and Coke Co. [1896], 2 Ch. 476; 65 L. J. Ch. (N. S.) 709; 74 L. T. Rep. 640; *In re* Marriage, etc. [1896], 2 Ch. 663; Gosling v. Gaskell, [1897] A. C. 575.

sumer, cannot be given a retroactive effect by allowing the company to shut off gas from the premises because of delinquent gas bills incurred for gas furnished at a house from which the consumer had moved before entering into such special contract.[142] Nor can the company shut off the gas from all the consumers of several houses where he holds a separate contract for the supplying of each house.[143] But where a consumer failed to pay a bill for the house in which he resided, and he then moved into another house where the company supplied him with gas for a while and then discontinued it, it was held that he could not compel it to continue to furnish him with gas until he had paid his old bills.[144] A company, however, cannot enforce the payment of disputed bills by shutting off the supply of gas; and if it attempted to do so, it may be enjoined;[145] especially after it has received payment for a subsequent and undisputed installment.[146] A gas company is not justified in shutting off gas furnished free to a person who is wasteful in its use; but the court will regulate the supply. As where a consumer furnished free gas used 300,000 cubic feet in a year, while the largest consumer similarly situated used not over 64,000 during the same year, the court limited the supply to 150,000 cubic feet.[147] And in an instance where a municipality was to be furnished gas free for all municipal purposes for the privilege of laying gas pipes in its streets, the court refused to enjoin an excessive and wasteful use, remitting the company to its action at law.[148] A promise by a new tenant to pay all gas bills of the former tenant unpaid is without consid-

[142] Lloyd v. Washington Gaslight Co., 1 Mackey 331; Cox v. Malden, etc., Co., 199 Mass. 324; 85 N. E. Rep. 180.

[143] Baltimore Gaslight Co. v. Colliday, 25 Md. 1.

[144] Mackin v. Portland Natural Gas Co., 38 Ore. 120; 61 Pac. Rep. 134; 49 L. R. A. 596 (rehearing denied, 62 Pac. Rep. 20).

[145] Bienville Water, etc., Co. v. Mobile, 112 Ala. 260; 20 So. Rep. 742; 33 L. R. A. 59; Penny v. Rosendale, etc., Co., 14 Gas J. 927; Sickles v. Manhattan Gaslight Co., 66 How. Pr. 314 (as where there was a dispute over the correctness of the meter measurement). *Contra*, Penn. Iron Co. v. Lancaster, 17 Lanc. Law Rev. 161; Shelley v. Westchester L. Co., 119 N. Y. App. Div. 61; 103 N. Y. Supp. 951.

[146] Wood v. Auburn, 87 Me. 287; 32 Atl. Rep. 906.

[147] Graves v. Key City Gas Co., 93 Iowa 470; 61 N. W. Rep. 937; Graves v. Key City Gas Co., 83 Iowa 714; 50 N. W. Rep. 283.

[148] Saltsburg Gas Co. v. Saltsburg, 138 Pa. St. 250; 20 Atl. Rep. 844; 10 L. R. A. 193.

eration, even though the gas company refused to furnish him gas without he agreed to its demand; and, therefore, the company cannot cut off his supply for a neglect to keep his contract in full.[149] A contract to supply natural gas so long as the supply does not fail, will authorize the company to cut off the supply when that contingency happens; and it cannot be enjoined from doing so.[150] An agreement that if the gas rent be not paid, the company may shut off the supply and take possession of the machinery of the mill furnished and the fixtures until payment is made gives the company no lien on the land, but only a chattel mortgage on the machinery and fixtures.[151] A statute giving a municipality a lien on the premises does not prevent it passing an ordinance providing that the gas may be cut off if past bills are not paid.[152] And it may be remarked in this connection that a municipality has the same power to enforce payment of arrearages as a private gas company has.[153] But the city cannot cut off a consumer's water supply for a failure to comply with the ordinance of the board of health respecting plumbing, in the absence of any regulation authorizing such action.[154] The consumer cannot prevent the company cutting off the gas on the ground that he is solvent and able to pay the bills;[155] although insolvency is an additional justifica-

[149] New Orleans Gaslight Co. v. Paulding, 12 Rob. (La.) 378.

[150] Thompson Glass Co. v. Fayette Fuel Co., 137 Pa. St. 317; 21 Atl. Rep. 93; Black Lick v. Saltsburg, 139 Pa. St. 448; 21 Atl. Rep. 432.

If gas be illegally cut off, the company cannot make a charge for turning it on again. Nor, as has been held, if properly cut off. American W. W. Co. v. State, 46 Neb. 194; 64 N. W. Rep. 711.

But where a consumer was in default for gas furnished, it was held that the company could include in his arrearages the gross price for gas without allowing the deduction granted for payment, and also incidental charges for severing and making connections. State v. Board, 105 Minn. 525; 117 N. W. Rep. 827.

A trustee in bankruptcy is not liable for arrears of gas bills, where he continues to occupy the premises. *In re* Flack [1900], 2 Q. B. 32; Cox v. Malden, etc., Co., 199 Mass. 324; 85 N. E. Rep. 180.

[151] St. Joseph Hydraulic Co. v. Wilson, 133 Ind. 465; 33 N. E. Rep. 113.

[152] Altoona v. Shellenberger, 6 Pa. Dist. Rep. 544.

[153] Tacoma Hotel Co. v. Tacoma Light and Water Co., 3 Wash. St. 316; 28 Pac. Rep. 516; Bellaire Goblet Co. v. Findlay, 3 Ohio C. D. 205; 5 Ohio Cir. Ct. 418; Penn. Iron Co. v. Lancaster, 17 Lanc. L. Rev. 161.

[154] Johnson v. Belmar, 58 N. J. Eq. 354; 44 Atl. Rep. 166.

[155] Bellaire Goblet Co. v. Findlay, 3 Ohio C. D. 205; 5 Ohio Cir. Ct. 418.

tion in the company cutting off the gas supply.[157] A landlord cannot prevent the company shutting off the gas from his tenant who is in arrears, or who has disobeyed the rules of the company with respect to waste; for the injury is to the tenant; and he being in default, he could not treat the action of the company as an eviction or as a reason for vacating the premises.[158] Where the plaintiff removed from the building the day the agent of the gas company took the statement of his meter, but he did not notify the company of his removal, and five days thereafter his wife notified persons taking the meter statement to cut off the gas and take out the meter, and the wife testified that no gas was burned after this notice was given, it was held that the question whether the company was justified in refusing the plaintiff a supply of gas at his newly acquired residence because of his indebtedness for gas furnished between the time the employe took out the meter and the time the plaintiff notified the company of his removal was a question for the jury.[160] An agreement between the company and a consumer, separate and distinct from the contract for a water supply, providing that the rent shall be paid in advance, the company's recovery by suit of an installment for a particular period will not prevent it from subsequently cutting off the supply of water, during

[157] People v. Manhattan Gaslight Co., 45 Barb. 136.

[158] Brass v. Rathbone, 153 N. Y. 435; 47 N. E. Rep. 905, affirming 40 N. Y. Supp. 466; 8 App. Div. 78. In this case it was also held that the company had not lost its right to cut off the supply because other consumers had violated the statute in the same particular.

A gas company may refuse to supply gas for premises without a contract with the tenant in possession, for the reason that such tenant alone has the right to give the company access to the premises to install and maintain a meter and to periodically read it to ascertain the amount of gas used. Vanderberg v. Kansas City, etc., Co., 125 Mo. App. 600; 105 S. W. Rep. 17.

Where the rules of the company required the owner or his agent to make the application in his own handwriting, and if made by the tenant it must be made with the written consent of such owner or agent, and the owner made the proper application, and after he had received water awhile, he transferred the premises to his wife, of which the company had no knowledge; and the bills thereafter falling due, no demand being made on the wife but on the husband, who failed to pay, it was held that the wife could not enjoin the company from turning off the water. Smith v. Scranton Gas and Water Co., 5 Lack. Leg. N. 235.

[160] Bennett v. Westchester Gaslight Co., 40 App. Div. 169; 57 N. Y. Supp. 847.

such period, for non-payment of the rent, the judgment being unsatisfied.[161] The conclusion of the gas company that a consumer is in arrears does not establish its right to cut off the gas for owners; but the fact of arrears is a question of fact, to be determined from the evidence.[162] If a tenant contract with his landlord to pay him for the gas he uses, the tenant is liable to the landlord, regardless of the latter's liability to the gas company.[162a]

§ 624. Injunction to prevent cutting off gas supply.—Rates.

An injunction lies to prevent a gas company cutting off the supply of gas on the ground that a consumer will not pay an illegal rate, or a disputed bill.[163] Where a gas company

[161] Hieronymus v. Bienville Water Supply Co., 131 Ala. 447; 31 So. Rep. 31. See Montreal Gas Co. v. Cadieux, etc., 11 Can. Q. B. 93.

[162] Morey v. Metropolitan Gaslight Co., 6 Jones & S. (N. Y.) 185.

A water company may shut off the supply of a city in arrears, even though it leave such city without fire protection; and an injunction will not lie to prevent it. Penn. Iron Co. v. Lancaster, 17 Lanc. Law Rev. 161.

Where the evidence showed that the plaintiff had never been a customer of the defendant, had never made an application to be supplied with gas, and that the defendant had never threatened to cut off any gas, a temporary injunction, it was held, should be refused. Paff v. Standard Gaslight Co., 118 N. Y. App. Div. 904; 103 N. Y. Supp. 438.

Upon showing that a consumer's gas supply was unlawfully cut off by the gas company without her consent, the burden is upon the company to justify by showing an indebtedness by the consumer to it which she has refused to pay, if that he relied on in justification. Hollander v. Westchester Lighting Co., 140 N. Y. Supp. 544; 79 Misc. Rep. 646.

Where a gas meter rental was paid at least one hour before the gas company's agent entered on plaintiff's premises, and though plaintiff notified him of the fact of payment, and prohibited his entry on the premises, he entered and shut off the gas, and locked the meter, and addressed her in a loud and insulting manner, a verdict of $50 damages was held not excessive. Dobbs v. Northern Union Gas Co., 137 N. Y. Supp. 785; 78 Misc. Rep. 136.

[162a] Bay Building Company v. Essenfeld, 167 N. Y. Supp. 315.

In an action against a gas company for illegally shutting off his gas the plaintiff must aver and prove that he is not indebted to the company for gas supplied in the past. Annapolis Public Utilities Co. v. Martin (Md.), 102 Atl. 465.

[163] Cromwell v. Stephens, 2 Daly 15; Bienville Water Supply Co. v. Mobile, 112 Ala. 260; 20 So. Rep. 742; 33 L. R. A. 59; Penn. Iron Co. v. Lancaster, 17 Lanc. Law Rev. 161; Levy v. Water Works Co., 38 La. Ann. 941; Wilkes-Barre Gas Co. v. Turner, 7 Kulp. 399; Sickles v. Manhattan Gaslight Co., 64 How. Pr. 33; 66 How. Pr. 304, 314; Graves v. Key City Gas Co., 83 Iowa 714; 50 N. W. Rep. 283; Sewickley v. Ohio Valley Gas Co., 154 Pa. St. 539; 25 Atl. Rep. 868; Smith v. London Gas Co., 7 Grant (U. C.) 112; People's Natural Gas Co. v. American Natural Gas Co., 233 Pa. 569; 82 Atl. 935.

Where a vendee retains out of the purchase money a sum to pay certain claims against the vendor, in-

entered into an agreement to supply natural gas so long as the gas was obtainable, it was held that an injunction lay to prevent its being cut off, where the result would be that the plaintiff would not be able to run its electric light company and keep its contracts to supply light with its customers.[164] And where, under a similar contract, the gas had been cut off, a preliminary mandatory injunction to restore it was granted.[165] Under such a contract, if the supply fail, the company may discontinue its efforts to furnish a supply.[166] A preliminary injunction restricting the shutting off of gas contracted to be furnished will be permitted to stand until final hearing, where no material injury can arise from preserving the *status quo*.[167] And although the right to gas rests upon a special contract between the consumer and the company, yet an injunction will be granted to compel the company to continue the supply of gas pursuant to such contract's terms,[168] especially where the consumer would suffer great damages, or not be able to carry out his contracts with his customers.[169]

cluding a claim of a lighting company for gas, and the fund is not sufficient to pay all of the claimants, the vendor is not barred from maintaining a bill in equity against the gas company to restrain it from cutting off the gas, because the vendor had refused to pay the gas company more than its pro rata share of the fund. Public Service Commission v. Northern Union Gas Co., 154 N. Y. Supp. 649, 168 App. Div. 731.

[164] Xenia Real Estate Co. v. Macy, 147 Ind. 568; 47 N. E. Rep. 147; State v. Connersville Nat. Gas Co., 163 Ind. 563; 71 N. E. Rep. 483.

If a gas company propose to shut off the gas from a gas main whereby a number of consumers will alike be deprived of gas, they cannot join in an action to prevent it, for they have not a common interest; and hence one consumer cannot sue for the benefit of all parties similarly situated. Nairin v. Kentucky Heating Co. (Ky.), 86 S. W. Rep. 676; 27 Ky. L. Rep. 551.

An injunction will not lie until the plaintiff has first tendered the amount of the proper charges. Buffalo v. Buffalo Gas Co. (N. Y.), 119 N. Y. Supp. 468.

[165] Whitman v. Fayette Fuel Gas Co., 139 Pa. St. 492; 20 Atl. Rep. 1062.

[166] Blacklick v. Saltsburg, 139 Pa. St. 448; 21 Atl. Rep. 432.

[167] Corbet v. Oil City Fuel Supply Co., 5 Pa. Super. Ct. 19; 40 W. N. C. 480. See Des Moines W. W. Co. v. Des Moines, 95 Iowa 348; 64 N. W. Rep. 269; United States, etc., Co. v. Metropolitan Club, 6 App. D. C. 536.

[168] Corbet v. Oil City Fuel Co., *supra*; Graves v. Key City Gas Co., 83 Iowa 714; 50 N. W. Rep. 283; 93 Iowa 470; 61 N. W. Rep. 937.

[169] Xenia Real Estate Co. v. Macy, 147 Ind. 568; 47 N. E. Rep. 147.

§ 625. Consumer's right to discontinue use of gas.

The general rule is that a customer within a municipality is required to pay for only as much gas as he consumes or as passes through his meter; and that he may discontinue the supply at any time.[170] Usually ordinances or statutes extend to such consumer the right to discontinue the gas at any time, even though he has paid for it in advance. But such ordinances or statutes, as an almost universal rule, do not prohibit a consumer entering into a contract with a company for a supply of gas for a specified period of time, and to bind himself to take the gas for that period of time and pay for it.[171] This is particularly true of municipalities which usually do and are allowed to make special contracts varying in price from that of the private consumer. Where such contracts are entered into

If a consumer has not paid or tendered the amount of his bill (with the penalty for delinquency when such a penalty may be inflicted), he has no standing in court to secure an injunction. Bower v. United Gas Imp. Co., 37 Pa. Super. Ct. 113; State v. Board, 105 Minn. 525; 117 N. W. Rep. 827.

Where a large mansion was divided into separate apartments, and the mansion was supplied through a large meter, and each apartment supplied with a small subsidiary meter, placed and maintained by the landlord, an injunction was granted to prevent him cutting off one of the apartments. Hersey v. White, 9 T. L. R. 335.

A natural gas company threatened to shut off plaintiff's supply of gas. It was alleged that by ordinance defendant was authorized to furnish gas for heating purposes only, and that, after proper connection had been made, the defendant had been enjoined from furnishing gas for lighting purposes in a suit to which plaintiff was not a party. It was charged that the defendant threatened to shut off plaintiff's gas unless its use for lighting was discontinued. It was not averred that there was any special contract between plaintiff and defendant, nor that plaintiff had made application for a gas connection for lighting purposes. It was held that the complaint stated no ground for relief by injunction. Nairin v. Kentucky Heating Co. (Ky.), 86 S. W. Rep. 676; 27 Ky. L. Rep. 551.

An injunction lies to prevent a natural gas company from disposing of substantially all its property in order to escape compliance with its contracts and to defraud its creditors, and, in case of a sale to another natural gas company, with notice of existing contracts for supplying gas, the purchaser will be compelled to specifically perform the contracts. People's Natural Gas Co. v. American Natural Gas Co., 233 Pa. 569; 82 Atl. 935.

[170] Nebraska City v. Nebraska City, etc., Co., 9 Neb. 339; 2 N. W. Rep. 870.

[171] Imperial Gas Co. v. Chauntler, 2 Gas. J. 362.

they cannot be rescinded, if they are otherwise valid. But, of course, a contract to pay more than the ordinance or statute rate would not be valid, unless the consumer was one the company was under no legal obligation to furnish gas. If a company does not keep its special contract by failing to furnish a supply of gas, the consumer may at once serve notice upon it that he will no longer take the gas, and he will not thereafter be bound to pay for gas, even though it be tendered and the contract provide that it should continue until either party should give the other thirty or other days' notice of their desire for a discontinuance.[172] Such a contract cannot be construed as running from year to year, after the first year, or as committing the company to supply gas during the whole of a subsequent year merely by failing to act on the consumer's default at the commencement of that year.[173] If a customer under a special contract refuses to take the gas provided for in the contract, the company may recover damages for breach of the contract, but it can recover only where the agreement is to take gas for a definite time, and then only such damages as it has sustained, and not the full contract price.[174] A failure to use gas while waiting for a tenant, will not entitle the company to discontinue it and recover liquidated damages under a clause in the contract that if the consumer discontinues the gas because the consumer is in arrears or fails to comply with the rules of the company, or is through the "fault" of the consumer prevented from supplying the gas according to the provisions of the contract, a specified amount shall "forthwith become due and payable" to the company as stipulated damages.[175] Where the agreement was that the consumer should declare an average minimum daily of the amount of gas which it would take annually, and would pay for it, though it took less, and that all gas it used in any month should be paid for monthly, it was held that the agreement required payment only at the end of the year for the part of the minimum

[172] Hieronymus v. Bienville Water Supply Co., 131 Ala. 447; 31 So. Rep. 31.

[173] Hieronymus v. Bienville Water Supply Co., *supra*.

[174] Queen City, etc., Co. v. Gibson House Co., 4 Ohio N. P. 119; 6 Ohio Dec. 148.

[175] United Electric Light, etc., Co. v. Breneman, 46 N. Y. Supp. 916; 21 N. Y. Misc. 41.

amount not taken.[176] An agreement provided that a certain company should sink a gas well and supply certain persons with gas and all others who might desire it, and that it was to become binding as soon as twenty persons agreed to become consumers of gas; it was held that the contract became binding as soon as twenty prospective consumers had signed it, and that no one of the subscribers could withdraw his name from the agreement without the consent of all the twenty subscribers and of the person who was to furnish the gas.[177] Where the owner of a well that was being drilled agreed with a gas company to pay for gas it should furnish a well-driller to run his drilling apparatus, and such owner had a contract with the well-driller to furnish him all the gas necessary to run such drilling apparatus, and such well-driller knew the gas was coming through pipes from the gas company; it was held that he was liable to pay for the gas he consumed, although he had never agreed to pay for it.[178] The consumer cannot cut off the supply of gas at the stop cock located in the street or sidewalk until after reasonable notice given to the company to shut it off, followed by neglect to do so; and if a rival company undertake to cut it off, even though the consumer may desire to make a change to it, an injunction will be granted to prevent it interfering with the stop cocks and service pipes, until after reasonable notice to the old company be given, and a failure on its part to cut off the connection.[179] A consumer who desires to discontinue the use of gas and escape liability for it, where it is furnished by the month or year, or the like, should notify the gas company, in order that they may shut off his supply,[180] but, of course, if he pays only for the amount registered by the meter, there is little reason to give such a notice, unless he desires it cut off from his premises. And if he is bound to take the gas, whether he use it or not, the gas company is not entitled to an injunction to compel him to use it, its action at law for damages giving sufficient compensation.[181]

[176] Conemaugh Gas Co. v. Jackson Farm Gas Co., 186 Pa. St. 443; 40 Atl. Rep. 1000.

[177] Current v. Fulton, 10 Ind. App. 617; 38 N. E. Rep. 419.

[178] Chamberlain v. Summit Gas Co., 3 Penn. (Pa.) 261.

[179] Pennsylvania Gas Co. v. Warren, etc., Co., 3 Pa. Dist. Rep. 67.

[180] Pennsylvania Gas Co. v. Warner, etc., Co., 3 Pa. Dist. Rep. 67.

[181] Steinau v. Cincinnati Gaslight and Coke Co., 48 Ohio St. 324; 27 N. E. Rep. 545; reversing 2 Ohio Cir. Ct. Rep. 286.

If a consumer owns two sets or

§ 626. Ownership of supply pipe.

When a supply pipe—a pipe running from the company's gas mains in the street to the meter in the house—is put down by the gas company, as often happens, it belongs to the owner of the real estate, and the company may not remove it upon the consumer or owner of the premises ceasing to be a customer; and this was held true even when the company had a steady rule in force when it put down the pipe that "the connecting pipes and works from the street mains to the consumer's premises shall at all times be under the control and management of the corporation, and shall be deemed to belong to them."[182] This was the case of a water company which put down a lead supply pipe, which poisoned the water; and it was held that inasmuch as the supply pipe belonged to the customer the company was not liable.[183]

lines of pipes and two meters, he may discontinue one and use the other. He may discontinue the use of illuminating gas entirely, and use fuel gas. State v. New Orleans, etc., Co., 108 La. 67; 32 So. Rep. 179.

[182] Milnes v. Hudersfield, 11 App. Cas. 511; 56 L. J. Q. B. 1; 55 L. T. 617; 34 W. R. 761; 50 J. P. 676; affirming L. R. 12 Q. B. Div. 443; which affirmed L. R. 10 Q. B. Div. 124.

[183] A rule of the gas company reserving to it the right to make all taps of or connections with its mains is a reasonable one. Pocatello Water Co. v. Standley, 7 Idaho 155; 61 Pac. Rep. 518.

Only the company owning the supply pipe can use it. Poughkeepsie Gas Co. v. Citizens' Gas Co., 20 Hun 214.

If the consumer owns the supply pipe he can enjoin the company when it attempts to remove it. State v. Connersville Nat. Gas Co., 163 Ind. 563; 71 N. E. Rep. 483.

The gas company may waive its written permission to make a connection with its mains. Citizens' Gas, etc., Co. v. Whipple, 32 Ind. App. 203; 69 N. E. Rep. 557.

CHAPTER XXVI.

METERS AND MIXERS.

§ 627. Definitions.
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§ 627. Definitions.

A meter (often spelled metre) may be defined as an instrument, apparatus or machine for measuring fluids, gases, air electrical currents, etc., and recording the results obtained. A dry meter is a gas meter not containing fluid as an essential part of it.[1] A water meter is one in which water is kept through which the gas passes. A gas mixer is a cylindrical instrument by which air is mixed with natural gas as it enters the burner, thereby securing greater combustion and producing a higher degree of heat with the same quantity of gas.

§ 628. Who must furnish.

It is almost the universal practice of gas companies to furnish gas meters whenever they are used; but this is a matter subject to local usage. Frequently statutes or ordinances require them,

[1] Standard Dictionary, "Meter."

to do so, free of charge. Probably the rule with respect to gas mixers is not so general as that with respect to gas meters, and patrons frequently furnish their own. Where an ordinance or statute requires them to furnish meters, a company cannot make an extra charge for them; and this occurs where a company is compelled to furnish gas at so much a thousand feet, nothing being said about who shall furnish the meter, it being considered the duty of the company to furnish and attach it to the pipes in a proper manner, in order to ascertain the amount of gas furnished.[2] But the company is not required to furnish more than one meter for a house—not one for each floor—unless the house is occupied by different tenants who have independent service pipes. When that is the case, each apartment is regarded as an independent house.[3] And if the company have the right to require a consumer to furnish a meter before it will supply him with gas, it has no right to insist that he shall furnish a meter when it does not make that requirement of others; for all must be treated alike. Nor has it the right to require a customer to furnish expensive meters when a meter costing less will correctly measure the gas.[4]

[2] Louisville Gas Co. v. Dulaney, 100 Ky. 405; 38 S. W. Rep. 703; 36 L. R. A. 125; 6 Am. and Eng. Corp. Cas. (N. S.) 241; Albert v. Davis, 49 Neb. 579; 68 N. W. Rep. 945; Capital, etc., Co. v. Gaines, 20 Ky. L. Rep. 1464; 49 S. W. Rep. 462; Sheffield W. W. Co. v. Carter, L. R. 8 Q. B. 632. *Contra*, Sheffield W. W. Co. v. Bingham, L. R. 25 Ch. Div. 443; 48 L. T. 604; 52 L. J. Ch. 624. See State v. Sedalia Gas Co., 34 Mo. App. 501; and Ladd v. Boston, 170 Mass. 332; 49 N. E. Rep. 627; 40 L. R. A. 171.

[3] Ferguson v. Metropolitan Gas Co., 37 How. Pr. 189; Young v. Baston, 104 Mass. 95.

The meters in use are a part of the plant, for the purposes of taxation. Com. v. Lowell Gaslight Co., 12 Allen 75.

[4] State v. Jersey City, 45 N. J. L. 246; 2 Am. and Eng. Corp. Cas. 233. It is not unreasonable to require the company to furnish a meter. Spring Valley W. W. v. San Francisco, 82 Cal. 286; 22 Pac. Rep. 910, 1046; 6 L. R. A. 756; 16 Am. St. Rep. 116. Such a statute is constitutional. Buffalo v. Buffalo Gas Co., 80 N. Y. Supp. 1093; citing Louisville Gas Co. v. Dulaney, 100 Ky. 405; 38 S. W. Rep. 703; 36 L. R. A. 125, and State v. Columbus, etc., Co., 34 Ohio St. 579; 32 Am. Rep. 390, and also People v. Budd, 117 N. Y. 1; 22 N. E. Rep. 682; 5 L. R. A. 559; 15 Am. St. Rep. 460; Spring Valley W. W. Co., 110 U. S. 353; 4 Sup. Ct. Rep. 48; Cotling v. Kansas City, etc., Co., 183 U. S. 85; 22 Sup. Ct. Rep. 30; Munn v. Illinois, 94 U. S.

§ 629. Control of meter.

The gas company, where it owns the meter, has the absolute control of it and the lead pipes used to make connections with it, subject to the use of it by the patron. If the patron owns it, the company cannot remove it if he cease using gas, but it can if it owns the meter. Their remedy is to cut the gas off where it does not own the meter, before it enters on the patron's premises, in case of non-user. Where the company own it and place it in position, attached to the pipes, this is not a bailment of it. In such an instance the patron or consumer has no right to interfere with it without notice to the company, unless in a case of emergency to prevent damages. Nor has he any right to place a governor upon it to regulate the pressure of the gas, or

113, as directly in point in principle.

It is a valid exercise of the police power for the State to require gas to be furnished through standard meters at a meter rate. Pawhuska Oil & Gas Co. v. Pawhuska, 47 Okl. 342; 148 Pac. 118.

The English cases seem to hold that although a water company is not bound to furnish a meter, yet the consumer is also not bound to furnish one; for he may prove the amount of water he receives independent of meter measurement. "I do not intend to decide that a meter is necessary. . . . I am not going to decide that any particular meter must be used. . . . All I am going to decide is that Mr. Bingham must at his own expense measure the water and record that measurement, and that he must give, of course, all facilities to the company to ascertain that he has measured the water and that he has measured it in some way or other which is an accurate way of taking the measurement." Sheffield W. W. Co. v. Bingham, 25 Ch. Div. 443, and 446 (36 Gas J. 769); Sheffield W. W. Co. v. Carter, 8 L. R. Q. B. Div. 632; 51 L. J. M. C. 97; 30 W. R. 889; 46 J. P. 548. See also Levy v. Water Works Co., 38 La. Ann. 29; Ernest v. New Orleans W. W. Co., 39 La. Ann. 550.

A city charter authorized its council to legislate for the protection of the city water works and the use of water taken from them, and also as to the means of ascertaining the amounts to be paid as water rates, and the water system was such that the consumer, at his own expense, made connections with the mains. It was held proper for the council to adopt an ordinance requiring the consumers, at their own expense, to provide meters for measuring the water they took, and that the ordinance might provide that only those using supply pipes over a certain diameter should be compelled to use meters. State v. Goswell (Wis.), 93 N. W. Rep. 542; citing Sheffield W. W. Co. v. Bingham, *supra;* Red Star S. S. Co. v. Jersey City, 45 N. J. L. 246; Spring Valley W. W. v. San Francisco, *supra;* Sheffield W. W. Co. v. Carter, L. R. 8 Q. B. Div. 632; 51 L. J. M. C. 97; 30 W. R. 889; 46 J. B. 548.

upon the supply pipe leading to the meter, if it belong to the company; and if he do, or any one else, the act is such a trespass as may be enjoined and the removal of the governor be compelled. In such an instance the court will readily interfere by an injunction; for as gas is a dangerous article, which if it escape may produce great injury or damages; the necessity for issuing an injunction is much more urgent and necessary than in an ordinary trespass. Even the defense of laches will not prevail in such an instance. And if a third person has placed the governor on the meter, he may be enjoined and compelled to remove it; and in such an instance it is not necessary to make the owner of the premises a party. In such an instance the owner cannot object to its removal. But the owner of the premises has a right to put a governor on his pipes after the gas has passed through the meter; or to attach it to the end of his pipe nearest the company's meter; and perhaps so much of the supply pipe as he owns and which is on his premises; and even here the company have a right to adopt reasonable regulations.[5] A consumer, however, is not relieved from all care of a meter entrusted to his care; for he is required to take proper care of it; and if he permit it to get out of repair through his neglect of duty he owes toward it, he may be bound by the result of its measurements, in case there is a substantial dispute over the amount furnished.[6]

[5] Blondell v. Consolidated Gas Co., 89 Md. 732; 43 Atl. Rep. 817; 46 L. R. A. 187. The secretary's consent to attach the meter is not the company's. De Mattos v. Gibson, 4 De G. & J. 276. See Baen Avon Coal Co. v. McCulloh, 59 Md. 403; 43 Am. Rep. 560.

A rule that the governor shall be connected with the pipe one foot from the meter is a reasonable one. Foster v. Philadelphia Gas Works Trustees. 12 Phila. 511.

[6] Preston v. Hayton, etc., Gas Co., 25 Gas J. 889; Victoria Docks Gas Co. v. Burton, 16 Gas J. 103.

If an explosion is occasioned because a sufficient quantity of water is not kept in the meter, the company will be liable for the damages occasioned. Ellis v. London Gaslight Co., 32 Gas J. 849.

That the owner of the premises, whether he or his tenant uses gas, has no right to interfere with a meter or mixer without notice to the company, see Pennsylvania Gas Co. v. Warren Gas Co., 3 Pa. Dist. Rep. 67.

Where a city infringed a patent by using disks in its water meters, it was required to remove them, although it took time and trouble to locate and do so. National Meter Co. v. Poughkeepsie, 75 Fed. Rep. 405.

§ 630. Unreasonable requirements.

An ordinance required a gas company to furnish natural gas by meters or through mixers, at the option of the consumer; but it was held void for unreasonableness, for the reason that the company may be able to use other appliances, at less cost to it, and without injury to the company.[7]

§ 631. Inspection of meters by company.

The company has the right to enter on the premises at reasonable times, upon notice first given of its intention, to inspect the meter, and especially to ascertain the amount of gas used.[8] In this respect, however, there are mutual rights and obligations that must be observed. The company has no right to visit the premises at unseemly hours—perhaps not out of business hours—except in a case of emergency; nor to visit them more than actually necessary, nor to remain on the premises for a longer period than is necessary to make the inspection or necessary repairs. Nor can the owner or consumer deny them the right to make all necessary inspection; for if he do, the gas company would be justified in removing the meter and refusing to supply him with gas, or cutting off his supply; or it might bring an action to compel him to allow an inspection.[8] But where it appeared that the defendant, in an action to compel him to permit the gas company to inspect a gas meter, was the lessee of the grounds and cellar floor of the building, the upper floor of which was occupied by other tenants; that the gas meter for this upper floor was in the cellar, having been placed there by the owner of the premises before the defendant took his lease, in which no mention was made of the meter; and it did not appear it would be impracticable to place the meter on the upper floor, it was held that the company must fail in its action.[9]

[7] Toledo v. N. W. Natural Gas Co., 5 Ohio Cir. Ct. 557; 3 Ohio Cir. Dec. 273. See Indiana, etc., Gas Co. v. State, 158 Ind. 516; 63 N. E. Rep. 220; 57 L. R. A. 761.

[8] Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479.

[9] Wilkes-Barre Gas Co. v. Turner, 7 Kulp 399.

The right to enter is a mere license to the gas company, to enter by its agents at reasonable times. Axman v. Washington Gaslight Co., 38 App. D. C. 150.

In an action by a patron of a gas company for an assault committed by the company's agents while forcibly entering the house

§ 632. Official inspection and tests.

In many instances statutes or ordinances require official inspection and tests, or inspections and tests by state or municipal authority. Usually these statutes or ordinances provide for sealing the meter, if found correct, and that a certificate of approval be furnished. In such an instance mandamus lies to compel the state or municipal official to make an inspection and test of a meter placed in proper position.[10] A statute providing that the gas companies of the State should pay the salary of a State gas inspector was held valid, it not being a tax for the purpose of general revenue within the meaning of a provision of the constitution requiring that taxes should be assessed upon property by a uniform rule, but a charge for a special purpose growing out of the supervisory power of the State over their business, and was not a tax on property.[11]

§ 633. Officially tested meters conclusive.

In New Brunswick a meter examined, tested and stamped by a government official is conclusive in its measurements when a contest arises over the amount of gas furnished; but the gas

in which the plaintiff was living to read a gas meter, it was held error to instruct the jury that they cannot consider the fact that the agents broke into the house in which she was living; for while she could not maintain an action for a trespass to the freehold, the jury were entitled to consider all the surrounding facts, in order to determine the damages sustained. So it is error to tell the jury that they may consider the fact that she and her husband acted in a suspicious manner which led the agents to infer the reason why they were denied entrance was because she had tampered with the gas meter so as to prevent it properly registering. So it was error to instruct the jury that, even if they could find that the entry was a forcible one and that the agents committed the assault they must also find, in order to charge the defendant gas company for such entry and assault that these acts were done either by express authority of the company, or, after being permitted, were known by the company and ratified. Axman v. Washington Gaslight Co., 38 App. D. C. 150.

[10] *In re* McDonald, 16 Misc. (N. Y.) 304; 39 N. Y. Supp. 367.

[11] Cincinnati Gaslight and Coke Co. v. State, 18 Ohio St. 237.

Fees for inspection. Baltimore v. Consolidated Gas Co., 99 Md. 540; 58 Atl. Rep. 216.

Office of inspector under N. Y. Laws, 1907, p. 930 § 82. People v. Wilcox, 112 N. Y. Supp. 341.

company has the burden to show that it was examined, tested and stamped as correct and accurate in its measurements.[12] But in New York the consumer may show by reliable testimony that he did not receive the amount of gas registered by an officially inspected meter.[13] For instance, he may show that the gaslight went out by air passing through the tubes, as affecting the quantity of gas consumed.[14] And where the consumer had entered into a contract to take the meter measurement as the measure of the quantity of gas furnished; it was held that the consumer would not be bound by the registration of the meter if it had not been examined and certified to by the official inspector.[15] Where there is a dispute over the accuracy of the meter's measurements, an injunction lies to prevent the company cutting off the gas until the accuracy of the charge can be determined by a suit at law.[16]

§ 634. Measurements of quantity of gas used.

The correct measurement of gas is a subject of importance both to the gas company and consumer. Usually, if not universally, in the case of artificial gas, the amount consumed is determined by a meter. And it may be laid down as a general rule that the amount registered by a meter is presumed to have been supplied and to be a correct measurement, unless there be evidence to cast a doubt upon its correctness. Thus where the question was whether the meters had registered correctly, in an action to recover back money paid for gas in excess of what was due, and the evidence showed that they registered correctly at a level, but registered in favor of the company at a high-water level, and in favor of the consumer at a low-water level; and that since dry meters had been put in, the bills diminished, it was held that taking into account the fact that the consumers must take proper care of their meters, and the conflict of the evidence, the decision must be for the defendant—the gas com-

[12] St. John Gas Co. v. Clarke, 17 N. B. 307.

[13] Sickles v. Manhattan Gaslight Co., 66 How. Pr. 314; Tarrytown, etc., Gaslight Co. v. Bird, 65 Hun 621; 19 N. Y. Supp. 988.

[14] Tarrytown, etc., Gaslight Co. v. Bird, *supra*.

[15] Manhattan Gas Co. v. Flamme, 12 N. Y. Weekly Dig. 245.

[16] Sickles v. Manhattan Gaslight Co., 66 How. Pr. 314.

pany.[17] So where the action was to recover for gas converted by the consumer to his own use, and it appeared that in some way the meter became tilted, and the gas passed through without registry, and the action was to recover the price of the gas it was estimated had passed through the meter without registry, and the consumer contended he had used only the amount registered; and for this he had paid; yet the jury found for the plaintiffs.[18] While it is true the meter measurement is *prima facie* correct, yet the consumer may show it is incorrect; and that too, even though a statute provides that such measurement shall be taken as *prima facie* evidence of its correctness.[19] Where the action was to recover for gas alleged to have been furnished and not registered because of its having been tampered with, and it appeared that the defendant had increased the number of his burners at a certain date, although the gas thereafter sensibly diminished; and six years thereafter the meter was tested by the gas inspector and found to be correct, but afterwards it was discovered that the water in the meter was kept too low, a simple fact easily discovered; and a part of the meter machinery was so arranged that it did not register; it was held that the plaintiff could recover for no gas used before the date of the inspection.[20] In the case of a wet meter, it seems to be the duty of the gas company to keep it properly supplied with water.[21]

§ 635. Delivery of and title to gas.

When gas has passed through the meter it is delivered to the consumer; and the title to it then vests in him. So that if after

[17] Preston v. Hayton, etc., Gas Co., 25 Gas J. 889.

[18] Victoria Docks Gas Co. v. Burton, 16 Gas J. 103. See also Hacker v. London Gaslight Co., 32 Gas J. 781.

[19] Alliance, etc., Co. v. Taaffe, 27 Gas J. 206.

[20] Imperial Gas Co., v. Porter, 5 Gas J. 372, 403.

[21] Hacker v. London Gaslight Co., 32 Gas J. 781.

Where a statute forbade any one to lay any pipe to communicate with the company's pipe without its consent, under a penalty, and a consumer being dissatisfied with the company's meter, put up a second meter of his own, he was fined. *In re* Gaslight and Coke Co., 57 Gas J. 1196.

A gas company cannot be compelled to furnish a city gas without measurement. Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122; 57 Atl. Rep. 482.

that period of time a third person obtains the use of it, the gas company is not liable for the consumer's loss, and he must pay for all registered by the meter.[22]

§ 636. Rules and regulations concerning.

A gas company has full power to adopt reasonable regulations and rules concerning meters and their use. And so has a municipality furnishing gas to private consumers. An order that all regulators or governors shall be attached to the gas pipes or to the meter, unless placed upon a by-pass so as the flow of gas may be directed through the pipes without passing through the governor regulator, is a just and reasonable regulation.[23]

§ 637. Extra charges for meters and mixers.—Government tax.

A company cannot make a charge for meter rent, where its

[22] Chouteau v. St. Louis Gaslight Co., 47 Mo. App. 326. See Schmeer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 70 N. Y. St. Rep. 92; 30 L. R. A. 653; Blondell v. Consolidated Gas Co., 89 Md. 732; 43 Atl. Rep. 817; 46 L. R. A. 187; Indiana, etc., Co. v. Anthony, 26 Ind. App. 307; 58 N. E. Rep. 868.

A contract by which a pipe line company agreed to accept a minimum number of feet of gas from owners of gas leases, and producing wells, held executory; title to the gas passing only as delivery was made. Ely v. Wichita Natural Gas Co., 99 Kan. 236; 161 Pac. 649.

[23] Foster v. Philadelphia Gas Works, 12 Phila. 511; Blondell v. Consolidated Gas Co., *supra*.

Where injuries to a gas company's meters, caused by interfering with its connections by a company installing appliances to regulate the flow of gas, were oft-recurring, and no adequate compensation in damages could be had therefor, the gas company was held entitled to enjoin the interference with its connections, but not to restrain the exercise of the inherent right of the owner to have the gas governors instituted, and such right should be protected by the decree awarding the injunction, should authorize the company placing the appliances to remove the same, under proper restrictions, on refusal or failure of the customers to pay agreed rent for their use. Laclede Gaslight Co. v. Gas Consumers' Ass'n, 106 S. W. 91, 127 Mo. App. 442.

Using meters in some of the supply pipes of a building by a water company to determine whether or not more than 150 gallons per day are being used in violation of a provision regulating the amount of water that may be used, does not violate a statute requiring the scale of water rates to be general and uniform. Frothingham v. Bensen, 20 Misc. 132; 44 N. Y. Supp. 879.

rate is fixed by a statute or an ordinance. Thus where a company by its charter was authorized to supply customers with gas, "under reasonable regulations," at a price not to exceed one dollar and thirty-five cents a thousand cubic feet, it was held it could not charge a meter rent in addition if less than a certain quantity was used. The company was bound to furnish the meter to measure the gas the court said, and could not charge for such a necessity.[24] But where neither a statute nor an ordinance, nor the company's charter impose any restriction upon the company concerning its charges, it may charge small customers more than large ones, and such charges are not invalid because they are called meter rents, when in fact the charges are charges up to a certain amount.[25] Adding the amount of the government's tax to the price is a legitimate charge.[26] A constructive contract to pay rental on gas meters for a season, not to exceed four months, is not inconsistent with a statute which prohibits any charge for the use of a gas meter during any part of twelve consecutive months if the consumer during that time used gas to the value of a specified sum. Thus where in an action for the rent of two gas meters, the jury could have found that the gas season for the defendants' houses at a summer rent did not exceed four months a year, that during the service of 1908 the meters were in his houses at his request, that previous to 1908 he was notified that if the amount allowed by law was not paid the meters would be removed, that he did not expect to have the gas turned on, except at the usual season and that he never requested to have it turned on at any other time, nor made any reply to the notice, but actively used the meters down

[24] Louisville Gas Co. v. Dulaney, 100 Ky. 405; 38 S. W. Rep. 703; 36 L. R. A. 125; 6 Am. and Eng. Corp. Cas. (N. S.) 241; Capital, etc., Gas Co. v. Gaines, 20 Ky. L. Rep. 1464; 49 S. W. Rep. 462; Buffalo v. Buffalo Gas Co., 80 N. Y. Supp. 1093; State v. Columbus, etc., Co., 34 Ohio St. 579; 32 Am. St. Rep. 390; Montgomery Light & W. P. Co. v. Watts, 165 Ala. 370; 51 So. Rep. 726.

[25] State v. Sedalia Gas Co., 34 Mo. App. 501.

[26] St. Louis Gaslight Co. v. St. Louis, 11 Mo. App. 55; 84 Mo. 202.

Where the company's charter contained no reference to its right to charge a meter rent, a subsequent statute provided that "no gas company shall have the right to charge rent for meters, when 500 cubic feet per month have been consumed;" it was held that the statute was binding on the company. State v. Columbus Gaslight and Coke Co., 34 Ohio St. 572; 32 Am. Rep. 390.

to the season 1908 without protest, it was held that there was an assent to the terms of the notice, and the meters were used thereunder, constituting a constructive contract, under which he was liable.[26a]

§ 638. Requiring use of a certain quantity of gas per month or pay a meter rent.

Where a gas company cannot charge a meter rent, it cannot evade the prohibitory clause by indirection. Nor can it adopt a rule that if a certain amount of gas is not consumed within a month or other period of time, the consumer shall pay a certain amount regardless of the amount consumed. To permit such a charge is in fact to allow the company to charge a meter rent, and thus cast a burden on the consumer it is bound to carry.[27]

§ 639. Discrimination in use of meter.

A company cannot show discrimination between two patrons by requiring one of them to take gas by meter measurement and permit the other to take it by a "flat" rate, if the discrimination is, in some measure, unjust and oppressive. But there must be something more than mere discrimination. The discrimination prohibited must not only be an actual one, but it must be both unjust and oppressive, to some extent. Thus where an ordinance provided that a gas company might charge twenty cents per thousand cubic feet, or a certain named "flat" rate, it was held in a proceeding for a mandamus to compel it to furnish the applicant gas at the "flat" rate, as it was furnishing all its other patrons, instead of the meter rate, that the applicant was not entitled to the writ unless he showed that the meter rate was a higher rate than the "flat" rate.[28]

[26a] Amesbury & S. Gas Co. v. Gibney, 210 Mass. 498; 97 N. E. 88.

[27] Buffalo v. Buffalo Gas Co., 80 N. Y. Supp. 1093.

[28] Indiana, etc., Gas Co. v. State, 158 Ind. 516; 63 N. E. Rep. 220; 57 L. R. A. 761.

That a discrimination must be both unjust and oppressive, see Cleveland, etc., R. R. Co. v. Closser, 126 Ind. 348, 354; 26 N. E. 159, 161; 9 L. R. A. 754; 22 Am. St. Rep. 593.

An ordinance of a municipality or a rule of the company that a consumer may put in a meter at his own expense and pay by meter measurement instead of a "flat"

§ 640. Removal of meters.

So long as a patron complies with the rules and regulations of the company, and pays his bills, the company cannot remove the meter from his premises, unless it be to replace it with another.[a] But where a company was not required to put in service pipes, yet entered into an agreement with the owner of the premises to do so, such owner (who was the consumer) agreeing to pay the cost thereof; it was held that the company had the right to remove its meter on the owner refusing or failing to pay for the pipes.[29] And where a consumer resorts to other methods of light, as the introduction of electric lights, and thereafter uses gas only occasionally, he ceases to be a consumer, and the company may recover his meter.[30] And where a company charged meter rent, though other consumers were not charged such a rent, and the customer refused to pay it, and did not use enough gas by a sixth part to pay the meter rent, it was held that the company had the right to refuse him gas.[31] Permitting a company to remove its meter pending a dispute as to the liability of the company to a penalty incurred by its refusal to supply the consumer, does not prevent such consumer enforcing the replacement of the meter, after the dispute is settled.[32] If a consumer has ceased to take gas, the company has a right to

rate is valid; and he cannot be denied his right to exercise the option given him. State v. Joplin W. W., 52 Mo. App. 312. An ordinance is not invalid that gives a householder the option to require a meter and pay for water used at rates which are different from the fixed house rates. Spring Valley W. W. v. San Francisco, 82 Cal. 286; 22 Pac. Rep. 910, 1046. See State v. Gosnell, 116 Wis. 606; 93 N. W. Rep. 542.

[a] Dobbs v. Northern, etc., Gas Co., 78 Misc. Rep. 136; 137 N. Y. Supp. 785 (by statute).

[29] Detroit Gas Co. v. Moreton Treich, etc., Co., 111 Mich. 401; 69 N. W. Rep. 659. In this case it was held that replevin lay to recover the meter.

See Glasgow v. Patrick, etc., Co., 22 Gas J. 54.

[30] Adams Express Co. v. Cincinnati Gaslight and Coke Co., 10 Ohio Dec. 389; 21 Wkly. Law Bull. 18; Fleming v. Montgomery Light Co., 100 Ala. 657; 13 So. Rep. 618.

[31] Smith v. Capital Gas Co., 132 Cal. 209; 64 Pac. Rep. 258.

[32] Jones v. Rochester Gas, etc., Co., 7 App. Div. 474; 39 N. Y. Supp. 1110.

If the company is bound to remove the meter on notice, the consumer cannot remove it; and if he do or attempt it, the company may enjoin him. Glasgow v. Patrick, etc., Gas Co., 22 Gas J. 54.

remove its meter; and if, upon demand, properly made, it be refused admission to remove the meter, it may force an entrance, using no unnecessary force, for that purpose.[33] Even though a gas company has the right to remove a gas meter for failure to pay bills, yet it has no right to break down doors in order to remove it. A section of a statute gave a gas company's servant upon exhibiting written authority, signed by its president, to enter premises in order to inspect and examine meters. Another section gave it authority to shut off gas for nonpayment of bills and to enter to inspect and remove the meter. It was held that the last section gave an absolute right to enter and remove the meter for failure to pay gas furnished, without the written authority of the president.[34]

§ 641. Slot meters.—Theft of cash deposited in them.

Slot meters are now in common use, and are objects of attraction to thieves. After the money is deposited in the meter it is beyond the consumer's control, unless he breaks open a meter to obtain it; and only the gas company can lawfully extract it. When the money has passed through the slot it at once becomes the property of the gas company, and any theft therefrom is the loss of the gas company, and not of the consumer.[35] As the slot meters are in the possession of the consumer, and the gas company only visits them periodically—as once a month or the like—so that it is unable to watch over them and their contents carefully, gas companies have sought to make their consumers liable for theft committed by third persons by their

[33] Hitchcock v. Essex & H. Gas Co., 71 N. J. L. 565; 61 Atl. Rep. 397; affirming 57 Atl. Rep. 135; Reed v. New York & R. Gas Co., 93 N. Y. App. 454; 87 N. Y. Supp. 810.

[34] Dobbs v. Northern, etc., Gas Co., 132 N. Y. Supp. 792.

A gas company is not liable for abusive language of its employee before he has entered a house to remove a meter, though his entrance after its use be a trespass. Dobbs v. Northern, etc., Co., 132 N. Y. Supp. 792.

Where the rent was paid after the gas company's servant had left the gas company's office with direction to remove the meter, and before he had arrived at the house his entrance to remove it was held to be a mere trespass, rendering the company liable only for nominal damages. *Ibid.*

[35] Parson v. Ft. Smith L. & P. Co., 180 Ark. 452; 158 S. W. 129.

contracts with such consumers, and such contracts have been held valid, even though they contain other illegal provisions, though severable from the agreement to pay.[36] The fact that the meter is located on the premises of a third person does not estop the company from relying on the contract, where that fact is equally known to both parties.[37] And a statute may provide that the consumer shall be liable for the money stolen from meter.[38]

[36] Birmingham Ry., etc., Co. v. Pratt, 10 Ala. App. 273; 64 So. 510; 65 So. 533.

[37] *Ibid;* Des Moines Gas Co. v. Des Moines, 238 U. S. 153; 35 Sup. Ct. 238; 59 L. Ed. 1244; modifying decree in 199 Fed. 204. Premises sub-let after contract signed. Pratt v. Birmingham Ry., etc., Co., 191 Ala. 238; 68 So. 151. Premises rented after contract signed.

[38] Public Service Commission v. Northern Union Gas Co., 168 App. Div. 731; 154 N. Y. Supp. 649.

CHAPTER XXVII.

FIXTURES.

Art. 1. Domestic fixtures.
Art. 2. Trade fixtures.
Art. 3. Oil and gas lease fixtures.

§ 642. Division of subject.

The subject of fixtures relative to gas or oil necessarily follows the lines laid down in text books on that subject; such as whether the question is one between vendor and vendee, lessor and lessee, landlord and tenant, and mortgagor and mortgagee. Another division is whether the article in dispute is a domestic or trade fixture; or whether it is one used upon oil or gas producing territory in the production or supply of oil or gas. The fixtures used in the latter instance usually have reference to the production of petroleum or natural gas. The subject, therefore, can be divided into three general subjects.

ARTICLE 1.

DOMESTIC FIXTURES.

§ 643. Intent.—Common law.—Public policy.
§ 644. Agreement.—Innocent purchaser.—Injury to freehold.
§ 645. Gas chandeliers.—Stoves.—Meters, etc.
§ 646. Judicial sale of premises.
§ 647. Gas fixtures may pass to vendee.

§ 643. Intent.—Common law.—Public policy.

The question of the intent with which an article is affixed to the premises or building is one that must always be consid-

ered in determining whether or not it is a fixture. The intent must often be gathered from the kind of article in controversy, and how it is attached to the premises. If an article is so attached to the premises by the owner of them that it cannot be removed without material injury to the freehold, and there is no contract with reference to it, then it is a part of the freehold, and will pass to a purchaser of the premises or be covered by a mortgage given by the owner of the freehold. "The united application of three requisites is regarded as the true criterion of an immovable fixture: (1) Real or constructive annexation of the article in question to the freehold. (2) Appropriation or adoption to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold." [1]

Continuing the court says: "According to the elementary rule of the common law whatever is annexed to the freehold becomes, in legal contemplation, a part of it, and is thereafter subject to the same incidents and conditions as the soil itself. But the diversity of trade and the development of manufactures require that the strict rules of the common law be measurably relaxed, and it may now be said that the nature of the article and the manner in which they are affixed, and the intention of the party making the annexation, together with the policy of the law, are controlling factors in determining whether an article, which may or may not be a fixture, becomes a part of the realty by being annexed to the freehold. The purpose or intention of the parties, the effort and mode of annexation, and the public policy in relation thereto, are all to be considered." [2]

[1] Binkley v. Forkner, 117 Ind. 176; 19 N. E. Rep. 753; citing Teaff v. Hewitt, 1 Ohio St. 511, 530; Potter v. Cromwell, 40 N. Y. 287; McRea v. Central Nat'l Bank, 66 N. Y. 489, quoted in Parker Land Improvement Co. v. Reddick, 18 Ind. App. 616; 47 N. E. Rep. 848.

[2] In Shellar v. Shivers, 171 Pa. St. 569, 33 Atl. Rep. 95, it is said: "Mere physical annexation is no longer the rule. . . . The intention to annex, whether rightfully or wrongfully, is the legal criterion." See also Hayford v. Wentworth, 97 Me. 347; 54 Atl. Rep. 940, where it was held that a "wash-down syphon water closet, and its appurtenances, put into a business office in the usual manner by a tenant at will

§ 644. Agreement.—Innocent purchaser.—Injury to freehold.

In the case already quoted from it is said concerning agreements relating to fixtures: "When the parties immediately concerned, by an agreement between themselves, manifest their purpose that the property although it is annexed to the soil, shall retain its character as personalty, then, except as against persons who occupy the relation of innocent purchasers without notice, the intentions of the parties will prevail, unless the property be of such a nature that it necessarily becomes incorporated into, and a part of, the realty by the act and manner of annexation.[3] Thus, if, in the course of constructing a house, brick should be placed in the walls, and joists and beams in their places, the brickmaker and sawyer would not be permitted to despoil the house by asserting an agreement with the owner that the brick and beams were to retain their character as personalty notwithstanding their annexation. In such a case the mental attitude of the parties cannot modify the legal effect from the annexation.[4] But when chattels are of such a character as to retain their identity and distinctive characteristics after annexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, nor destroy or unnecessarily impair the value of the chattels, a mutual agreement in respect to the manner in which the chattels shall be regarded after annexation will have the effect to preserve the personal character of the property between the parties to the agreement.[5] Accordingly, the proposition is well

for his own use, and which could be removed without material injury to the realty, did not become merged in the realty unless it was so put in with an intention to make a permanent accession to the realty."

As to what gas fixtures are covered by a policy of insurance, see New York Gaslight Co. v. Mechanics' Fire Ins. Co., 2 Hall 108.

[3] Citing Taylor v. Watkins, 62 Ind. 511, and Yater v. Mullen, 24 Ind. 277.

[4] Citing Campbell v. Roddy, 44 N. J. Eq. 244; 14 Atl. Rep. 279; Henkle v. Dillon, 15 Ore. 610; 17 Pac. Rep. 148.

[5] Citing Rogers v. Cox, 96 Ind. 157; Price v. Malott, 85 Ind. 266; Hendy v. Dinkershoff, 57 Cal. 3; Haven v. Emery, 33 N. H. 66; Malott v. Price, 109 Ind. 22; 9 N. E. Rep. 718.

sustained that one who purchases machinery with a view that it shall be annexed to, or placed in, a building of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold.[6] Except where the rights of innocent purchasers are involved, it is the policy of the law to uphold such contracts in the interest of trade."[7] It was also held in this case that if the detachment of the fixtures covered by the chattel mortgage would occasion some diminution in value of the freehold, as it would have stood had the attachment not been made, then the depreciation must be made whole by the chattel mortgagee to a junior mortgagee of the freehold, and the rights of the parties adjusted by the court according to the equity of the case.[8]

§ 645. Gas chandeliers.— Stoves.— Meters, etc.

But while the quotations made in the preceding sections seem to lay down rules easily understood, yet trouble arises in

[6] Citing Eaves v. Estes, 10 Kan. 314; Ford v. Cobb, 20 N. Y. 344; Sisson v. Hibbard, 75 N. Y. 542; Tift v. Horton, 53 N. Y. 377; Campbell v. Roddy, 44 N. J. Eq. 244; 14 Atl. Rep. 279; Henkle v. Dillon, 15 Ore. 610; 17 Pac. Rep. 148.

[7] Binkley v. Forkner, 117 Ind. 176; 19 N. E. Rep. 753. The court cites and comments on Pierce v. George, 108 Mass. 78, where a subsequent mortgage of the real estate took precedence of a previous chattel mortgage of machinery attached to the building; and also cites Hunt v. Bay State Iron Co., 97 Mass. 279. See United States v. New Orleans R. R., 12 Wall. 362, and Fosdick v. Schall, 99 U. S. 235. "The distinction," said the court in Binkley v. Forkner, *supra*, "between chattels whose completeness and identity as separate and distinct articles may be preserved notwithstanding their annexation, and those which necessarily become absorbed or merged in the realty by being annexed must be kept in view."

[8] Binkley v. Forkner, 117 Ind. 176; 19 N. E. Rep. 753.

Electric lighting fixtures used in and about a theatre that can be detached without injury to the building, such as switchboard to connect a dynamo to the permanent wiring of such building, chandeliers, and electric signs, are chattels and not part of the realty in New York. New York Life Ins. Co. v. Allison, 107 Fed. Rep. 179; 46 C. C. A. 229. The retention of the title to a portable furnace by the vendor gives him an implied right to retake it if not paid for, even after it is set up; so that it is not included in a prior mortgage on the realty. Duffus v. Howard Furnace Co., 8 N. Y. App. Div. 567; 40 N. Y. Supp. 925.

their application. Thus, it has been held that gas chandeliers in a house, attached by screws to pipes conveying the gas are not part of the realty. "Gas fixtures," said the court, "whether in the form of chandeliers suspended from the ceiling at the top of the room, or projecting as brackets from the perpendicular walls, though attached to pipes by screws and made tight by cement, are in the nature of furniture, and do not lose their character as chattels by reason of the manner in which they are affixed." [9] Accordingly, therefore, to the greater number of authorities, gas fixtures, chandeliers, gaseliers, candelabra, sconces, and other instruments used as substitutes for oil lamps and candles in lighting a house, and gas stoves, will not pass to the vendee of the realty as a part of it. They are regarded as personal property, and do not pass by the ordinary deed of conveyance.[10]

[9] Towne v. Fiske, 127 Mass. 125; 34 Am. Rep. 353. So it was held, because of the character of the article, that an action of tort would not lie for their conversion. Guthrie v. Jones, 108 Mass. 191.

[10] Rogers v. Crow, 40 Mo. 91; 93 Am. Dec. 299; Shaw v. Lenke, 1 Daly 487. In this last case it is said that, "the adjustment of the bracket or chandelier to the gas pipe is not such an actual annexation to the freehold as is contemplated by law." Kirchman v. Lapp, 19 N. Y. Supp. 831; Vaughen v. Haldeman, 33 Pa. St. 522; 75 Am. Dec. 622; Jarechi v. Philharmonic Society, 79 Pa. St. 403; 21 Am. Rep. 78; Penn. Mut. Life Ins. Co. v. Thackara (Pa.), 10 Wkly. W. N. C. 104; 11 Wkly. W. N. C. 391; 13 Reporter 731; McLean v. Palmer, 2 Kulp (Pa.) 349 (oil lamps); Wilson v. Freeman, 7 Wkly. W. N. C. (Pa.) 33 (chandeliers in a saloon); Voorhis v. Freeman, 2 Watts. and S. 116; 37 Am. Dec. 490; Heysham v. Dettre, 89 Pa. St. 506 (heaters).

In England a statute authorized a gas company to let for hire to the user of gas "any fittings for the gas," and declared that such "fittings" should not be the subject of distress when let to his tenant. This statute was held to cover a gas stove, used for heating purposes only, and rented to a tenant. Gaslight and Coke Co. v. Hardy, 17 Q. B. Div. 619; 56 L. J. Q. B. 168; 55 L. T. 585; 36 W. R. 50; 51 J. P. 6. And the same rule was adopted where a stove was used for cooking, "containing besides the burners and the chamber in which the gas was consumed, other chambers together with grates, hot plates and arrangements for the reception of cooking utensils." Gaslight and Coke Co. v. Herbert Smith, 3 Times Law Rep. 15. Gaslight and Coke Co. v. Hardy, 56 L. J. Q. B. 168.

Meters put upon premises by a gas company, and attached to the gas pipes by solder, and by means of those pipes to the company's main, belong to the company. Regina v. Inhabitants of Lee, L. R. 1 Q. B. 241; 35 L. J. M. C. 105; 12 Jur. (N. S.) 225; 13 L. T. (N. S.) 704; 14 W. R. 311. City removing

Gas chandeliers so far partake of the nature of personal property, that a thief who severs and immediately carries them away may be convicted of larceny.[11]

§ 646. Judicial sale of premises.

The rule as between vendor and vendee is applicable to an instance where the premises are sold under judicial or other like process; and the right of the former owner and purchaser at such sale are determined exactly the same as if the former owner had himself sold the premises to the purchaser under the enforced sale.[12] And this is true even though the sale is one conducted under the provisions of a mortgage.[13]

§ 647. Gas fixtures may pass to vendee.

As intimated in a previous section, the ordinary gas fixtures may pass to the vendee. In a New York case it is said that they may pass as a part of the realty, if the intent that they shall so pass is shown by acts and declarations of the vendor.[14] But some of the cases go farther than this. Thus in England it was said: "The gaseliers (chandeliers) are a part of the gas pipes, and, to use a legal expression, they take their nature and are

water meter after building had been prepared for its use. Ladd v. Boston, 170 Mass. 332; 49 N. E. Rep. 627; 40 L. R. A. 171. Gas purifiers, gas holders, pumps and exhausters are taxed or rated as fixtures in England. Regina v. Lee, *supra*.

[11] Smith v. Commonwealth, 14 Bush. (Ky.) 31; 29 Am. Rep. 402.

For instance, where gas fixtures are held to be realty, see *Ex parte* Acton, 4 L. T. (N. S.) 261; *Ex parte* Wilson, 2 Mont. and Ayr. 61; 4 Dea. and Chit. 143; 4 L. J. (N. S.) Bank. 24; and Central Trust, etc., Co. v. Cincinnati, etc., Co., 26 Wkly. Law Bull. 149; 11 Ohio Dec. Rep. 348.

In Scotland gas fixtures are personal property. Nisbet v. Mitchell-Innes, 7 R. 575.

[12] Vaughen v. Haldeman, 33 Pa. St. 522; 75 Am. Dec. 622; Towne v. Fiske, 127 Mass. 125; 34 Am. Rep. 353; McNally v. Connolly, 70 Cal. 3; 11 Pac. Rep. 320.

[13] Montague v. Dent, 10 Rich. 135; 67 Am. Dec. 572.

In Pennsylvania shares of stock in an oil company, an oil lease and an interest in the fixtures thereon cannot be attached, under Act of July 12, 1842, for wages. Dawson v. Kirby, 6 Pa. Dist. Rep. 13; 27 Pitts. L. J. (N. S.) 234.

[14] Funk v. Brigaldi, 4 Daly 359; Central Trust, etc., Co. v. Cincinnati, etc., Co., 26 Wkly. Law Bull. 149; 10 Ohio Dec. Rep. 348.

included in the fixtures which go with the house under the lease. They are as much a part of the gas pipes as the mill stones are part of the mill. Although the gaseliers may be unscrewed and taken off without injuring the freehold, they are necessary to the enjoyment of the gas pipes, which are of no practical use when separated from them." [15] And in America are cases holding gas fixtures to be a part of the realty. Thus in New Jersey it was said: "Gas burners are fixtures. They are in no sense furniture, but are mere accessories to the mill. The apparatus for the manufacture of gas (called a generator) is situated in a pit made expressly for it in a small building built for it a short distance from the main building. It is connected with a gas pump in the building, and the pipes are attached to the beams and girders by hooks, and in some places pass through the holes in the side walls, bored for the purpose. The generator and its appurtenances, and the pipes are fixtures." [16] What is said about "gas burners" may be regarded as a *dictum;* but it is evident that the court would have held them to be a part of the realty if there had been a controversy over them. In Kentucky it is held that chandeliers, affixed by means of screws to iron pipes let into the walls of the house, in order to conduct gas to the burners, even though they could be moved without injury to the walls or ceilings, and which formed an ornamental addition to the house, belong to the vendee as between him and the vendor, being a part of the real estate.[17] And in New York it was held that gas logs may be fixtures if the intention of the owner was to make them such; and that the intention was to be determined from such owner's acts and conduct, and from all the circumstances of the transaction.[18] So in the same State it

[15] Sewell v. Angerstein, 18 L. T. (N. S.) 300. See also Hutchinson v. Kay, 23 Beav. 413.

[16] Keeler v. Keeler, 31 N. J. Eq. 181, 191. In Hays v. Doane, 11 N. J Eq. 84, it is held that a gasometer and apparatus for generating gas, are movable property, and not fixtures, as between landlord and tenant.

[17] Johnson v. Wiseman, 4 Met. (Ky.) 357; 83 Am. Dec. 475.

[18] Cosgrove v. Troescher, 62 App. Div. (N. Y.) 123; 70 N. Y. Supp. 764. Same rule applied to gas fixtures. Daniels v. Detwiler, 14 Mont. Co. L. Rep. 58; 15 Lanc. L. Rev. 165.

was held that gas pipes passed to the vendee of a store, although they were put in by the tenant of the vendor, who had a right to remove them as against his landlord.[19] In Ohio it was held by the *nisi prius* court that where chandeliers and gas brackets were affixed to a building in a manner to indicate an intention on the owner's part to make them a part of such building, they were fixtures and passed to the vendee.[20] So in Pennsylvania a gas machine, a part of a suburban dwelling house, put in at the time the house was built, and connected with it by underground pipes running through the foundation walls and joining in the house permanent machinery; and to this machinery was connected the ordinary gas pipes of a house, was held to be subject to a mechanic's lien, and therefore part of the realty.[21] But it has also been held in that State that gas fixtures do not pass to the vendee of the realty, in the absence of an intent that they shall be included in the sale.[22] In California a hotel was conveyed "with the appurtenances thereunto belonging." This conveyance was made in pursuance of a written agreement providing that the vendor might remove his furniture, carpets and pictures, but none of the "permanent fixtures and appurtenances." Under these facts the court considered that there was a special agreement concerning the gas fixtures and fittings, the kitchen range, water filter, tanks and mosquito screens, to the effect that they were to go with the real estate.[23]

[19] Smyth v. Sturges, 108 N. Y. 495; 15 N. E. Rep. 544; affirming 30 Hun 89.

[20] Central Trust, etc., Co. v. Cincinnati, etc., Co., 26 Wkly. Law Bull. 149; 10 Ohio Dec. Rep. 348. So in Pennsylvania. Daniels v. Detwiler, *supra*.

[21] Light Co. v. Gill, 14 Pa. Co. Ct. R. 6.

[22] Daniels v. Detwiler, 15 Lanc. L. Rev. 165; 14 Mont. Co. L. Rep. 58.

[23] Fratt v. Whittier, 58 Cal. 126; 41 Am. Rep. 251.

Of course, a special agreement supersedes the general rule and controls the right to remove gas fixtures. Wall v. Hinds, 4 Gray 256; 64 Am. Dec. 64.

ARTICLE 2.

TRADE FIXTURES.

§ 648. Between mortgagor and mortgagee.
§ 649. Gas pipes in houses.
§ 650. Landlord and tenant.
§ 651. When tenant must remove.

§ 648. Between mortgagor and mortgagee.

The rule between mortgagor and mortgagee is not sensibly different from the rule between vendor and vendee. It is therefore held that gas fixtures and gas ranges are personal property as against the mortgagee of the realty, and can be removed by the mortgagor.[24]

§ 649. Gas pipes in houses.

Gas pipes fixed within the walls of houses, and also those leading from the premises in the street to the house, are clearly fixtures, and pass with a conveyance of the house or premises.[25] Thus where a water pipe was laid across adjoining land to supply a house with water, it was held that it passed with a conveyance of the house.[26] But pipes may be placed in a house

[24] Cosgrove v. Troescher, 62 App. Div. (N. Y.) 123; 70 N. Y. Supp. 764; Rogers v. Prattville Mfg. Co., 81 Ala. 483; 1 So. Rep. 643; (machinery); New York Life Ins. Co. v. Allison, 107 Fed. Rep. 179; 46 C. C. A. 229 (dynamos and engine for driving the dynamos); Vail v. Weaver, 132 Pa. St. 363; 19 Atl. Rep. 138 (electrical machinery placed in the building for the purpose of supplying light, after the mortgage was executed, with no intent to make it a part of the realty); Keeler v. Keeler, 31 N. J. Eq. 181, 191; Duffus v. Howard Furnace Co., 8 N. Y. App. Div. 567; 40 N. Y. Supp. 925 (portable furnace, where vendor retained the title); McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38; 37 Am. Rep. 471; Capehart v. Foster, 61 Minn. 132; 63 N. W. Rep. 257; 52 Am. St. Rep. 582 (also an electric annunciator, but not a steam radiator; criticising National Bank v. North, 160 Pa. St. 303; 28 Atl. Rep. 394).

[25] Smyth v. Sturges, 108 N. Y. 495; 15 N. E. Rep. 544; affirming 30 Hun 89; *Ex parte* Wilson, 2 Mont. and Ayr. 61; 4 Dec. and Chit. 143; 4 L. J. (N. S.) Bank 24.

Where there was no agreement between the gas company and house owners concerning the pipes used by the company to make meter connections with the house pipes, the pipes which were used to make the connections were held not to have become fixtures. Laclede Gaslight Co. v. Gas Consumers' Ass'n, 127 Mo. App. 442; 106 S. W. Rep. 91.

[26] Philbrick v. Ewing, 97 Mass. 133.

under such circumstances as to show an intent that they should remain personal property. Such was the case where the owner of a store room contracted with an electric lighting company to put electric wires and fixtures in his store room, and agreed to use the light for one year and pay for it "in conformity with the regulations endorsed" on the written and signed contract. One of these regulations was that the company should have access to the premises for the removal of the lamps or wire. Channels were dug in the plastering of the walls of the rooms, the wires placed in them, fastening them with staples, and then covered over by filling such channels with mortar, restoring the walls as nearly as possible to their former condition. It was held that the ownership of the wires was a question of the intention of the parties, and was for the jury.[27]

§ 650. Landlord and tenant.

The right of a tenant to remove fixtures from the rented premises practically stands on a contract between him and his landlord, usually an implied one, but not infrequently an express one. The law does not presume that fixtures placed by the tenant on the rented premises, in order to enable him to use or enjoy them, and which can be removed without injury to such premises, were intended either by him or his landlord to become a part of the realty, and to remain after the tenancy had expired. If there is an express contract concerning their removal, that will control; but in the absence of such a contract, the law raises an implied contract that the tenant can remove them if he perform the act of removal at a proper time and in a proper manner. Usually he must remove them during the term of the tenancy. "A great part of the gas fixtures, such as the gasometers and the apparatus for generating gas, as between landlord and tenant, are movable property. They would, it is

[27] Harrisburg, etc., Co. v. Goodman, 129 Pa. St. 206; 19 Atl. Rep. 844. See Wall v. Hinds, 4 Gray 256, 64 Am. Dec. 64, where gas pipes were held to be removable fixtures as between landlord and tenant. Gas mains. Poughkeepsie Gas Co. v. Citizens' Gas Co., 20 Hun 214; Laclede Gaslight Co. v. Gas Consumers' Ass'n, 127 Mo. App. 442; 106 S. W. Rep. 91.

true, pass to the heirs-at-law with the inheritance, or between grantor and grantee, as fixtures to the real estate; but as between landlord and tenant, the latter has a right to remove them during the term." [28] Such fixtures are regarded as his personal property during the term of the lease, especially if they are trade fixtures.[29] Thus gas pipes passing from the cellar through the floors and partitions, retained in their places by metal bands, are such fixtures as a tenant may remove, even though some of them pass through wooden ornaments of the ceilings, which are cut away for their removal.[30] If an incoming tenant purchase from his landlord the fixtures upon the demised premises, they of course become personal property, and he may remove them.[31]

§ 651. When tenant must remove.

One line of authority expressly limits the right of the tenant to remove the fixtures to the term of his lease, giving him the right to remove them at any time during the lease, or while he continues tenant; but after the expiration of such lease and the surrender of the premises to the landlord, he cannot enter on such premises to remove the fixtures. And the reason of this rule is said to be that when he quits the premises, leaving his fixtures behind him, it will be presumed that he intended to aban-

[28] Hays v. Doane, 11 N. J. Eq. 84; Elliot v. Bishop, 10 Exch. 512; Childs v. Hurd, 32 W. Va. 66; 9 S. E. Rep. 362; Seeger v. Pettit, 77 Pa. St. 437; Guthrie v. Jones, 108 Mass. 191.

[29] Kile v. Giebner, 114 Pa. St. 381; 7 Atl. Rep. 154; *Ex parte* Morrow, 1 Lowell's Dec. 386; 2 N. B. R. (2d ed.) 665.

[30] Wall v. Hinds, 4 Gray 256; 64 Am. Dec. 64. This is particularly true if there be an agreement to that effect.

A tenant may remove a tile floor and an electric light apparatus placed in a building for business purposes, if he leave the building in as good condition as it was at the beginning of the lease. Ross v. Campbell, 9 Colo. App. 38; 47 Pac. Rep. 465.

That a tenant may remove, see Wilde v. Waters, 16 C. B. 637; 24 L. J. C. P. 193; 1 Jur. (N. S.) 1021; Elliott v. Bishop, 24 L. J. Exch., p. 39; 42 L. J. Exch., p. 229; 10 Exch. 496.

[31] Ryall v. Rolle, 1 Atk., p. 175.

Generally, that a tenant may remove gas fixtures he puts in, see Elliott v. Bishop, 10 Exch. 496; 24 L. J. Exch., p. 39; 42 Id., p. 229; D'Eyncourt v. Gregory, L. R. 3 Eq. 382.

A gas engine laid on a raised bed of concrete and screwed down to bolts sunk in the concrete and fastened into the ground, is a fixture, and is therefore not distrainable by the landlord for rent. Crossley v. Lee, 77 L. J. K. B. 199; [1908] 1 K. B. 86; 97 L. T. 850; 24 T. L. R. 35, following Hobson v. Garringe, 66 L. J. Ch. 114; [1897] 1 Ch. 182, and Reynolds v. Ashby, 72 L. J. K. B. 51; [1903] 1 K. B. 87; and not following Hellawell v. Eastwood, 20 L. J. Exch. 154; 6 Exch. 295.

don them.[32] But the rule that he must remove them during the tenancy may be modified by an express agreement. Thus where property by an express agreement between the tenant and landlord was made personal property, it was held that it could not be contended that it was not the tenant's fixtures, and therefore movable, only during the tenancy.[33] So where it was agreed when the lease was surrendered, that the landlord should sell the fixtures for the tenant's benefit, and at the request of the landlord the tenant left them on the premises, it was held that the latter had not lost his right to them, and that the former was liable for their conversion.[34] So acceptance of a new lease by the tenant is not a waiver of his right to the trade fixtures he has placed upon the premises, although there be no agreement with respect to them, unless such new lease in clear terms cover the fixtures upon the premises leased.[35] But some authorities extend the rule farther than those just cited would indicate. Thus it was decided in New York that trade fixtures did not cease to be the tenant's property by reason of the mere fact that he did not remove them during his term; and that he could "remove them after his term expired without subjecting himself to any damages for such removal, even though he be liable to an action for trespass for an entry on the premises demised." It was also held that the tenant could mortgage them by a chattel mortgage, and that they could be levied upon with an execution against him.[36] In Illinois it was held that the tenant had a reasonable time within which to remove trade fixtures, and what was a reasonable time was a proper question for the jury, under the instructions of

[32] Childs v. Hurd, 32 W. Va. 66; 9 S. E. Rep. 362; Friedlander v. Rider, 30 Neb. 783; 47 N. W. Rep. 83; Wall v. Hinds, 4 Gray 256; 64 Am. Dec. 64; Hays v. Doane, 11 N. J. Eq. 84.

[33] Lake Superior Ship Canal, etc., Co. v. McCann, 86 Mich. 106; 48 N. W. Rep. 692.

[34] Thorn v. Sutherland, 123 N. Y. 236; 25 N. E. Rep. 362, reversing 4 N. Y. Supp. 694; East Sugar Loaf Coal Co. v. Wilbur, 5 Pa. Dist. Rep. 202.

[35] Second National Bank v. O. E. Merrill Co., 69 Wis. 501; 34 N. W. Rep. 514; Wright v. McDonell, 88 Tex. 140; 30 S. W. Rep. 907.

[36] Lawrence v. Kemp, 1 Duer. 363.

the court.[37] This is undoubtedly true where a forfeiture of the lease takes place; and if the tenant is denied the right after the forfeiture to remove them, he may bring an action therefor, especially if the lease contain an agreement giving him the right to make such removal.[38]

ARTICLE 3.

OIL AND GAS LEASE FIXTURES.

§ 652. Coal and mineral leases.
§ 653. Oil and gas lease fixtures.
§ 654. Conveyance or mortgage of fixtures.
§ 655. Special contract controls.
§ 656. Gas and oil pipe lines.

§ 652. Coal and mineral leases.

The right of a lessee in an oil or gas lease does not differ from the right of a tenant in an ordinary agreement for the renting of premises for trade purposes. There is no difference, taking into consideration the character of the fixtures, in this respect, between a lease to bore for oil or gas and one to dig for coal or other minerals. In the case of a mere parol license to mine for coal, and the license is revoked, the licensee may remove his fixtures within a reasonable time; and there is no reason why the same is not applicable to an oil or gas license or lease.[39] Thus a steam engine, boilers, and pumps, sunk into a ledge of rock in order to get a level, and covered by a shed for shelter, used in working a mine, is a trade fixture, and may be removed by the tenant, unless the right to remove it is controlled by an agreement, or by some local usage.[40] The rule extends not only to

[37] Berger v. Hoerner, 36 Ill. App. 360; Nigro v. Hatch, 2 Ariz. 144; 11 Pac. Rep. 177.

[38] Sattler v. Opperman, 30 Pittsb. Leg. J. (N. S.) 205. See also Potter v. Gilbert, 177 Pa. St. 159; 35 Atl. Rep. 597; 35 L. R. A. 580.

[39] Desloge v. Pearce, 38 Mo. 588; Springfield, etc., Co. v. Cole, 130 Mo. 1; 31 S. W. Rep. 922.

[40] Merritt v. Judd, 14 Cal. 60; Wake v. Hall, 7 Q. B. Div. 295; 8 App. Cas. 195; Hewitt, etc., Co. v. Watertown, etc., Co., 65 Ill. App. 153. But see Crossley v. Sell, 77 L. J. K. B. 199.

a steam engine and machinery connected therewith, but to all fixtures or appliances used for the purpose of hoisting coal from the mine. These remain the property of the lessee.[41] Thus a sale of a seller's interest in a "colliery" includes "all the movable property belonging to and used at the place in mining coal"; and it is not error to so instruct the jury, and add "that the word 'colliery' is a collective compound including many things, and is not limited to the lease and fixtures of a tunnel, drift, shaft, slope, or vein from which coal is mined."[42] Where a lease was made for the purpose of mining iron ore, and it was provided that the lessee would, at its termination, peaceably surrender the premises, "and other improvements and erections that may be thereon — engine, boilers, machinery, tools, implements, and other movable personal chattels excepted;" it was held that this agreement made engines and boilers personal property as between the lessor and an execution creditor of the lessee, and that they could not be treated as trade fixtures.[43] Where A. entered into an agreement with B. to put in machinery to bore a salt well on the latter's land, in consideration of which he was to have a share of the property and business, but never sunk the well, and B. sold and conveyed the lands to C.; it was held that the machinery did not pass by the conveyance; for the reason that the machinery was put on the premises for a temporary purpose, to sink a well, and as it would be removed without injury to the freehold, it did not become realty, not being so intended or especially adapted for permanent use as a part of the freehold.[44] So a sale of a coal mine does not include, im-

[41] Dobschuetz v. Holliday, 82 Ill. 371; Hewitt, etc., Co. v. General Electric Co., 61 Ill. App. 168; Audenried v. Woodward, 4 Dutch. (N. J.) 265; Davis v. Moss, 38 Pa. St. 306; Heffner v. Lewis, 73 Pa. St. 302 (a railroad to the mine); Williams' Appeal, 1 Monaghan (Pa.), 274; Montooth v. Gamble, 123 Pa. St. 240; 16 Atl. Rep. 594 (houses); Ritchie v. McAllister, 14 Pa. Co. Ct. Rep. 267 (railroad).

[42] Carey v. Bright, 58 Pa. St. 70.

[43] Lake Superior Co. v. McCann, 86 Mich. 106; 48 N. W. Rep. 692.

A mining flume running along the bank of a river to a mine was held not exempt from taxation under a statute exempting mining claims. "It is not affixed to the claim so as to become a part of it. It is rather to be regarded as machinery, or as apparatus useful in mining." Hart v. Plum, 14 Cal. 148.

[44] Bewick v. Fletcher, 41 Mich. 625.

plements, tools, and movable articles of the mine;[45] but it does include the machinery and fixtures of the mine, the trouble generally being to determine what is and what is not a fixture.[46]

§ 653. Oil and gas lease fixtures.

A lessee of land, to bore for oil, who does not find any oil has a right to remove not only the machinery used in sinking the well but also the casings in the wells, unless there be a contract to the contrary concerning their removal.[47] And a levy of an execution upon "all right, title and interest of the defendant [lessee] of, in and to a certain lease-hold estate situate," etc., "together with the oil wells, engines, boilers, engine houses, derricks," etc., etc., "and all the machinery and fixtures belonging to said well and lease," covers the fixtures of the lease-hold.[48] Where a lease of ground was given for three years and as much longer as oil or gas was found in paying quantities, with the right to remove all fixtures "at any time," it was held that the fixtures must be removed within a reasonable time after the expiration of the three years' period, or within a reasonable time after the time it was determined that neither oil nor gas could be secured in paying quantities; and that the phrase "at any time" could not be stretched so as to include an unreasonable length of time after the lease had in fact terminated. "The

[45] Fisher v. Dixon, 12 Cl. and F. 312.

[46] Dudley v. Warde, Amb. 113.

In Colorado a statute provides that the terms "land" and "real estate" shall embrace claims. Under this statute it is held that an engine placed in an engine house on a frame bolted down to timbers sunk in the ground and earth tamped around them, and a boiler set on rock work, with the ordinary connections with the engine, were fixtures. Roseville Alta Mining Co. v. Iowa Gulch Mining Co., 15 Colo. 29; 24 Pac. Rep. 920. But a gas engine laid on a raised bed of concrete and screwed down to bolts sunk in the concrete and fastened into the ground were held to be a fixture, and was not therefore distrainable by the landlord for rent. Crossley v. Lee, 77 L. J. K. B. 199; [1908] 1 K. B. 86; 97 L. T. 850; 24 T. L. R. 35, following Hobson v. Garringe, 66 L. J. Ch. 114; [1897] 1 Ch. 182, and Reynolds v. Ashby, 72 L. J. K. B. 51; [1903] 1 K. B. 87, and not following Hellawell v. Eastwood, 20 L. J. Exch. 154; 6 Exch. 295.

[47] Siller v. Globe Window Glass Co., 21 Ohio C. C. 284; 10 Ohio Cir. Dec. 784. Leases forfeited, yet the fixtures were not thereby lost by the lessee. Perry v. Acme Oil Co., 44 Ind. App. 207; 88 N. E. Rep. 859, reversing former decision. 80 N. E. Rep. 174.

Under a lease with an option to purchase, the machinery placed by the lessee on the land is personalty; and the same is true if the lease is one at will, in the absence of notice to quit. Powell v. Plank, 141 Mo. App. 406; 125 S. W. Rep. 836.

[48] Titusville Novelty Iron Works' Appeal, 77 Pa. St. 103.

lease was for a fixed period," said the court, " to be extended to an indefinite period, and the extension to depend upon what the future might develop. The right to enter at any time, and the right to remove machinery at any time, was predicated on that part of the term that was uncertain, that is, after three years the lessee had the right at any time to enter and drill additional wells, if oil or gas was being produced in paying quantities; and had the right, although the three years had passed, to remove the machinery and fixtures after or when the well would cease to produce oil or gas in paying quantities. If this construction is correct, then the rule of law as to removal of fixtures, as when it depends upon a contingency, and that is, that the removal must be made within a reasonable time; or in other words, the law in such cases allows the tenant a reasonable time for the removal of the fixtures. Here the lessees, if oil or gas has been found in paying quantities, would have had a reasonable time within which to draw their casing and remove their derricks after it had become apparent that the operation of the wells was no longer profitable, let this be soon or long after the expiration of three years; at any time when they thought it would no longer pay to operate their wells which had been producing oil or gas in paying quantities, they had a right to remove the fixtures connected with such wells. Under the facts as we have them in this case, however, operations ceased on this lease in April, 1887; a dry hole was found, nothing was done between the completion of this well and the time when the lease expired in November, 1888, and after that four years were allowed to expire before an attempt to remove these fixtures was made. In our opinion, this was too late. If, under the words 'at any time' the lessee could take four years after the expiration of the lease to remove his fixtures, he could as well take twenty years. To say that the lessor could prevent this by giving notice that the fixtures must be removed within a certain time, is to read something into the contract that is not there." [49] Contingencies may arise that will not require the lessee to remove his fixtures at the expiration of the lease, or even within what would have otherwise been a reasonable time.

[49] Shellar v. Shivers, 171 Pa. St. 569; 33 Atl. Rep. 95; Perry v. Acme Oil Co., 44 Ind. App. 207; 88 N. E. Rep. 859, reversing decision in same case, 80 N. E. Rep. 174.

Thus where there arose a dispute between the lessor and lessee as to when the lease expired and the controversy was taken into the courts, and was decided against the lessee, it was held that the lessee could remove the fixtures at the termination of the suit, although the lease had long before expired; and if the lessor had refused to permit the lessee to so remove them, he was liable in damages.[50] A covenant on the part of the lessee to develop gas or oil land leased is separate and apart from an agreement of the lessor that the lessee might remove the fixtures at the expiration of the lease or within a reasonable time thereafter; and if the lessor seize the fixtures for the reason that the lessee has failed to keep his covenant, he will be liable in damages.[51]

§ 654. Conveyance or mortgage of fixtures.

A conveyance of the lands whereon are gas or oil wells owned and worked by the owners of the land will carry with it those fixtures attached to the freehold necessarily used in such work; and so a conveyance of the leasehold interest by the lessee will also carry such fixtures, unless there be an agreement to the contrary.[52] But it will not carry oil in tanks on the leased premises.[53] Tanks for holding the oil, placed by the owner of the land upon a foundation of earth and lumber, are presumed to be such permanent accessions to the land as will subject the land to a mechanic's lien, and of course pass with a conveyance

[50] Sattler v. Apperman, 30 Pitts. L. J. (N. S.) 205. See also Wright v. McDonnell, 88 Tex. 140; 30 S. W. Rep. 907.

[51] A steam engine in a coal mine for the use of the tenant, and removable without injury to the mine, is not a fixture. Hewitt, etc., Co. v. Watertown Steam Engine Co., 65 Ill. App. 153.

A derrick erected by a tenant in a quarry, by placing a post upright in a socket in the ground, is a trade fixture, and is not subject to a mechanic's lien. Honeyman v. Thomas, 25 Ore. 539; 36 Pac. Rep. 636.

An engine house of little value built around machinery that is not a fixture, and which has no use disconnected from the machinery, and is temporary in its character, is a chattel and not a fixture. Powell v. Plank, 141 Mo. App. 406; 125 S. W. Rep. 836.

Under an oil lease where the wells drilled were producing wells, it was held that they, with the attached machinery, were real estate and not personal property. Johnson v. Siddy (Ind. App.), 109 N. E. 934.

[52] Roseville Alta Mining Co. v. Iowa Gulch Mining Co., 15 Colo. 29; 24 Pac. Rep. 920; Ritchie v. McAllister, 14 Pa. Co. Ct. Rep. 267.

[53] McQuire v. Wright, 18 W. Va. 507.

thereof.[54] In Pennsylvania an Act of the legislature [55] provides that it shall "be lawful for every lessee for a term of years of any colliery, mining land, manufactory, or other premises, to mortgage his or her lease or term in the demised premises, with all buildings thereon, to the lessee belong[ing] and thereunto appurtenant, with the same effect as to the lessee's interest and title, as in the case of mortgaging a freehold interest and title as to lien, notice, evidence and priority of payment": but the mortgage and lease must be placed of record in the proper county, and the mortgage can in no wise interfere with the landlord's right, priority or remedy for rent.[56] After the passage of the Act it was held that in a mortgage of the leasehold, including "all machinery and fixtures thereon — one boiler, one engine, two tanks, etc.— and all and singular the appurtenances thereunto belonging," was included a leather belting; and that it was competent to show by parol evidence that the belting was actually on the leasehold premises when the mortgage was executed, and was embraced therein.[57] The word "fixture" as used in this Act has been held to include mine cars and all such machinery and appliances as are essential to the operation of a colliery, but not prop-timber.[58] The mortgage of an electric lighting plant, including boilers, engines and dynamo, "with all the appurtenances thereunto belonging," includes masts erected in the street and wires strung thereon, along which the electric current was conducted to electric lamps.[59] Without the aid of a statute, a tenant may so mortgage his leasehold as to cover the

[54] Parker Land, etc., Co. v. Reddick, 18 Ind. App. 616; 47 N. E. Rep. 848. *Contra*, Seider's and International, etc., Co. v. Lewis, 7 Pa. Dist. Rep. 278; 21 Pa. Co. Ct. Rep. 80.

[55] Act of April 27, 1855; P. L. 369.

[56] This act was construed to apply to oil land or gas leases. Gill v. Weston, 110 Pa. St. 312; 12 Atl. Rep. 921.

[57] Gill v. Weston, *supra*.

[58] Baker v. Atherton, 15 Pa. Co. Ct. Rep. 471.

[59] Fechet v. Drake, 2 Ariz. 239; 12 Pac. Rep. 694.

Where the owner of a ranch conveyed a part of it, excepting "all oils, petroleum, asphaltum, and other minerals," and then conveyed to another the remaining part of the ranch, reserving the minerals; and the first grantee "granted and sold" to the second grantee "all the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever" situated upon any portion of the ranch, it was held not to be a mere conveyance of these as chattels, but it gave the right to occupy sufficient land for the use of the property for the purpose and in the way it had theretofore been operated. Dietz v. Mission Transfer Co., 95 Cal. 92; 30 Pac. Rep. 386.

fixtures upon it.[60] And he may bring under a mortgage of the existing machinery and plant of a leasehold, after acquired machinery or fixtures placed upon the premises during the continuance of the security;[61] but the terms of the mortgage must expressly include such after acquired property, for a mere mortgage of existing property will reach after acquired property.[62]

[60] Lawrence v. Kemps, 1 Duer. 363.

In Bainbridge on Mines and Minerals (edition of 1900, 5th), 263, the English law with respect to mining fixtures is stated as follows: "And regarding the removability of fixtures properly so called, and their sale or devolution separately from the land or mine, the following points appear to be established, namely—Firstly, as between an executor or administrator and the devisee or heirs—whether the deceased was the owner in fee of the land or of the mine, the devisee or heir will, as a general rule, be entitled to the machinery also, which has been annexed to the freehold, and which has become a part of the inheritance—as *e. g.*, in the case of a salt mine or salt works (Lawton v. Salmon, 1 H. B. 259); and the special circumstances must be shown to alter that rule (Lowther v. Cavendish, 1 Eden 99; Wood v. Gaynon, 1 Amb. 395; Lushington v. Sewell, 1 Sim. 435); also, where the *corpus* of any machinery or fixture belongs to the heir or devisee, he is entitled to all the parts capable of being used in a detached state, if they really belong to it. (Fisher v. Dixon, 12 Cl. and F. 312). But, secondly, as between the tenant for life and the person entitled in remainder or reversion —the executor of the tenant for life will, as a general rule, be entitled to the machinery and fixtures. Thus, where a fire engine for working a collier had been set up by the tenant for life; and it was proved to be customary to remove such works; but it appeared also that the engine could not be removed without tearing up the soil and destroying the brick work—Lord Hardwicke decided that the engine was part of the personal estate of the late tenant for life, and went to his executor (Lawton v. Lawton, 3 Atk. 13); and he applied the same rule in a subsequent case to a deceased tenant in tail (Dudley v. Warde, Amb. 113; Lawton v. Salmon, 1 H. Black 259). And, thirdly, as between a mining lessee and his lessor, a still greater liberality in favor of the lessee or of his executor prevails (Grymes v. Boweren, 6 Bing. 439) subject only to this condition, namely, that the lessee or his executor must exercise his right to remove the fixtures during the continuance of the term or during what has been termed the excrescence of the term (Heap v. Barton, 12 C. B. 274; Penton v. Robart, 2 East 88) —*scil.*, because he will otherwise be considered to have relinquished his claim (Minshull v. Lloyd, 2 M. and W. 459; Weston v. Woodcock, 7 M. and W. 14)." See also Hewitt v. Watertown Steam Engine Co., 65 Ill. App. 153 (steam engine in coal mining for use of tenant).

[61] Holyrod v. Marshall, 2 Giff. 382; 2 DeG. F. and J. 596; 3 L. J. Ch. 655; 30 L. J. Ch. 385; 3 L. J. Ch. 193.

[62] Reeve v. Whitmore, 33 L. J. Ch. 63.

In oil fields where parties negotiate respecting a lease which is in operation, either to sell or mortgage it, they consider the equipment used in operating the lease as part of the lease; but if purchased under a judicial sale the title obtained is limited ordinarily to the terms of the decree of sale. Niece v. Percy, 29 Ohio Cir. Ct. Rep. 219. See Powell v. Plank, 141 Mo. App. 406; 125 S. W. Rep. 836.

§ 655. Special contract controls.

Special agreements relating to fixtures contained in leases, especially in mining leases — often settle the rights of the parties with reference to machinery and fixtures. Thus where a lease of land and salt mines gave the lessee the right to erect a warehouse, build quays, salt pits and other works, reserving a certain rent for every salt pan then or thereafter erected by the lessee; and the lessee *covenanted to leave all the buildings, quays and salt works in good repairs* — it was held that he could not remove any salt pans he had built.[63] Where a lessee covenanted to leave all the "fixed materials," except the salt pans and other movable articles used at the salt works; and he assigned the lease; and in a renewal of the lease the assignee covenanted to give up possession of the premises, with all improvements, cisterns, doors and other fixtures and appurtenances, stipulating for the right to take away the salt pans and other articles used, it was held that he had only the right to take such fixtures as could properly be called tenant's fixtures.[64] But where a lessee of a coal mine and iron works covenanted to yield, at the end of his term, all "ways and roads" in good repairs, and fit for immediate future use; it was held that the agreement did not cover tram plates and wooden sleepers of the railroad laid down by the lessee, which had been seized under an execution against him, but that it did cover rails and sleepers in place at the time of the lease, it being the intention of the lessor and lessee to bind only those in existence at the

As against a trustee in bankruptcy, the mortgagee of a mine, with engines and other fixtures, is in general, entitled to all the machinery fixed to the freehold (Mather v. Frazer, 2 Kay and J. 536; 25 L. J. Ch. 361; Whitmore v. Empson, 23 Beav. 313; 26 L. J. Ch. 364); but not to the movable fixtures, which vest in the trustee. Whitmore v. Empson, *supra*. Usually, however, the mortgage must contain a clause authorizing the mortgagee to sever the fixtures before he can claim them. Mather v. Fraser, *supra*; Begbie v. Fenwick, L. R. 8 Ch. App. 1075, note; *Ex parte* Daglish, *In re* Wilde, L. R. 8 Ch. App. 1072; *Ex parte* Barclay, *In re* Joyce, L. R. 9 Ch. App. 576; Batchelor v. Yates, 38 Ch. Div. 112.

[63] Earl of Mansfield v. Blackburne, 3 Scott (N. S.) 820; 6 Bing. N. C. 427.

[64] Summer v. Bromilow, 34 L. J. Q. B. 130.

time of the lease and not those thereafter acquired; and that it was not the intention to bind the lessee to continue for a long term of years the repairs of railroads which might have become useless. It was considered that the terms of the covenant were satisfied by the railroad being left in a proper state for the relaying of rails by the lessor.[65]

§ 656. Gas and oil pipe lines.

We have already seen that a water pipe laid across an adjoining lot to supply a house with water passes with a convey-

[65] Beaufort (Duke) v. Bates, 3 DeG. F. and J. 381; 31 L. J. Ch. 481; Bird v. Crabb, 30 L. J. Ex. 318.

So if a tenant purchase the fixtures of his landlord, he may remove them. Ryall v. Rolle, 1 Atk., p. 175. See also Handforth v. Jackson, 150 Mass. 149; 22 N. E. Rep. 634.

The owner of mineral land leased it for the purpose of mining, the lease providing that all timbers placed in the shafts should be regarded as fixtures; and in case of a surrender of the lease the lessee would permit a re-entry before the actual surrender to install pumping machinery, and that the lessor should have the right to buy all mining machinery and buildings erected during the term, and if he did not purchase them, the lessee should have sixty days after the termination of the lease within which to make a renewal of them. Another clause provided for a leasing by the lessor of the premises, machinery and appurtenances. It was held that the machinery and appliances on the land were trade fixtures, placed there by the lessee, did not at once become a part of the freehold, but that the lessee had such an interest in them that he could place a chattel mortgage upon; yet upon the lessor recovering possession of the land by summary proceedings for non-payment of rent, before the removal of such trade fixtures and without an assertion of a right by the lessee to remove them or his mortgagee, they became the lessor's property as a part of the freehold, and the mortgagee could not thereafter remove them. Massachusetts National Bank v. Shinn, 18 N. Y. App. Div. 276; 46 N. Y. Supp. 329.

One who erects a building on another's land by license may remove it, if its removal be practicable and works no serious injury to the land, on the termination of the license. Ingalls v. St. Paul, M. and M. Ry. Co., 39 Minn. 479; 40 N. W. Rep. 524.

If one in possession of land, under contract of purchase, voluntarily erects a house thereon, without either an express or implied agreement with the land owner that it shall remain personal property, it becomes part of the realty, and belongs to the owner of the soil. Kingsley v. McFarland, 82 Me. 231; 19 Atl. Rep. 442.

Where it was found that wells could not be pumped with profit, it was held that the lessee, under a clause in his lease permitting him to remove all machinery he had placed on the leased premises, could remove the well casing on termination of the lease. Collins v. Mount Pleasant Oil & Gas Co., 85 Kan. 483; 118 Pac. 54; Snow v. Smith, 86 Vt. 58; 83 Atl. 269.

ance of the house.[66] A gas company which has condemned a right of way for its line may enter and remove its pipe line when the supply of gas has failed; but it must remove them at a time and in a manner least harmful to the land owner, and subject to the payment of a compensation for any actual injury to growing grain or grass. Should the field be a meadow, then it must pay for all substantial injuries to the turf beyond the mere opening and filling of the trench in which the pipe lies.[67] The right to remove them is made to hinge on the failure of gas.[68] Pipe lines of artificial and natural gas companies laid in the street, with the consent of the municipality, remain the personal property of the company.[69] But where the pipe line was buried two and a half to three feet on land of persons from whom the pipe line company had, by deed, acquired a right of way, and was used to carry crude petroleum, it was held that it was "real estate" within the meaning of the New Jersey tax law.[70] A gas company that lays a pipe line through lands without permission of the owner is not entitled to maintain a suit against the land owner to enjoin him from removing it; for by its act of placing it in the soil he became the owner of it, and the pipe line cannot be treated as a fixture.[71]

[66] Philbrick v. Ewing, 97 Mass. 133.

[67] Clements v. Philadelphia Co., 184 Pa. St. 28; 38 Atl. Rep. 1090; 28 Pitts. L. J. (N. S.) 344; 41 W. N. C. 321; 39 L. R. A. 532.

[68] In England gas pipes in the ground are taxed or rated to the proprietors in the parish where they are laid, although the ownership of the land itself may be in other individuals. It is held that the proprietors of the pipes are in the possession of the space they occupy. Regina v. Rockdale W. W. Co., 1 M. and S. 634; Regina v. Birmingham Gas Co., 1 B. and C. 506; Regina v. Brighton Gas Co., 5 B. and C. 466; Regina v. West Middlesex W. W. Co., 1 E. and E. 716; Sheffield United Gas Co. v. Sheffield, 4 B. and S. 135.

[69] Memphis Gaslight Co. v. State, 6 Coldw. (Tenn.) 310.

[70] State v. Berry, 52 N. J. L. 308; 19 Atl. Rep. 665.

In Texas poles, wires and lamps of an electric lighting company erected in the street for lighting purposes, are real property. Keating, etc., Co. v. Marshall, etc., Co., 74 Tex. 605; 12 So. W. Rep. 489.

[71] Windfall, etc., Co. v. Terwilliger, 152 Ind. 364; 53 N. E. Rep. 284.

CHAPTER XXVIII.

NUISANCES.

§ 657. Scope of chapter.
§ 658. Pollution of well or spring by artificial gas.
§ 659. Pollution of running streams.
§ 660. Pollution of subterranean waters.
§ 661. Damages occasioned by storing or bringing oil on land.
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§ 670. Evidence.
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§ 672. Enjoining erection of gas plant.
§ 673. Former recovery a bar.
§ 674. Indictment for nuisance.
§ 675. Waste of natural gas or oil.

§ 657. Scope of chapter.

This chapter is limited to instances affecting gas and oil, without any general discussion of the principles applicable to Nuisances, except as they may incidentally be noticed in considering particular instances.

§ 658. Pollution of well or spring by artificial gas.

Most cases of nuisances with reference to the manufacture and supply of gas have arisen out of the pollution of wells or springs. If a company permit gas to escape from its reservoir or pipes, and it percolates through the soil and enters a well or

spring, injuring the quality of the water, or polluting the water before it enters such well or spring, the gas company will be liable to the owner for the damages thus done, and the fact that other causes contributed to the injury of the water will not bar an action for damages, though it may be shown to affect their amount.[1] So if the wastings from the refuse of its gas works enter the well of an adjoining property owner, rendering it unfit for household purposes or stock it will be liable, such pollution being considered a nuisance.[2] The company is liable where the rains wash the deleterious substances from the refuse of the works and the water runs along and enters the well or spring at its mouth, corrupting the well or spring water, the same as if it had soaked through the soil.[3] A city operating gas works is liable for the pollution of a well the same as a private corporation or an individual would be if it had been operating such works.[4] A stockholder in the company injured by its act may maintain a suit to abate the nuisance, even to enjoin the continuation of the pollution.[5] A lessee may also maintain an action for the pollution of a well upon the demised premises; *[5] but his right of action is limited to recover for the injury to his possessory interest, while the landlord must bring the action for any injury to the reversion.[6] Directors of a gas

[1] Sherman v. Fall River Works Co., 5 Allen 213; Columbus Gaslight Co. v. Freeland, 12 Ohio St. 392; Millington v. Griffiths, 30 L. T. 65; 23 Gas J. 215; Ottawa Gaslight Co. v. Graham, 28 Ill. 73; Brown v. Illius, 25 Conn. 583; Kinnaird v. Standard Oil Co., 89 Ky. 468; 12 S. W. Rep. 937; 7 L. R. A. 451; P. Ballentine & Sons v. Public Service Co., 86 N. J. L. 331; 91 Atl. 95.

[2] Pensacola Gas Co. v. Pebley, 25 Fla. 381; 5 So. Rep. 593; Hendrie v. Lea Bridge, etc., Co., 21 Gas J. 949, 989.

[3] Brown v. Illius, 27 Conn. 84; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Grange v. Pately, etc., Co., 14 Gas J. 309.

[4] Shuter v. Philadelphia, 3 Phila. 228. In this case the court said: "A municipal corporation owning and occupying property for public uses is as much subject as a private person to the rule, *sic utere tuo ut alienum non laedas*. The city is as much bound as an individual owner of a lot, to find an outlet for the water on it, without encroaching on his neighbor."

[5] Hendrie v. Lea Bridge, etc., Co., 21 Gas J. 949, 989.

*[5] Hendrie v. Lea Bridge, etc., Co., 21 Gas J. 949, 989.

[6] Sherman v. Fall River Iron Works, 2 Allen 524. See Chapman v. South, etc., Co., 61 Gas J. 359, 415, 460.

company have been held personally liable for damages caused to a well by noxious substances escaping from the works of the company of which they were such officers.[7] Where a statute rendered a gas company liable to a penalty which should "suffer any wastings, etc., to be conveyed into any well," this was held to render it liable though the well contaminated had been disused by the owner for several years. It was also held that the facts of non-user and the closing of the well because of its having been polluted, even though coupled with the acceptance by the owner of the use of substituted wells of the company, was not such an abandonment of the former as to alter its character and make it no longer a well, nor could a license to pollute it be inferred from such a state of facts.[8] The word "suffer" as above quoted was applied to an instance of this kind, and the company held liable. In 1854 a gas company erected a tank for gas about one hundred and thirty feet from the plaintiff's well, the site being selected by the company's engineer, and the tank erected on solid sandstone with proper materials. The gas company knew mines in the neighborhood had been worked, but did not know that they had been worked under or near any part of their land. In 1838 there had been workings under half of the company's land, and from 1848 to 1855 these workings had been brought to within one hundred and eighty feet of the company's tank. In consequence of these facts the bottom of the gas tank cracked, and the wastings in it flowed out and through the soil to the plaintiff's well. It was held that the gas company had *suffered* the wastings to flow into the plaintiff's well, and were liable within the meaning of the statute quoted.[9]

[7] Millington v. Griffiths, etc., Co., 30 L. T. 65; 23 Gas J. 215. See Rex v. Medley, 6 C. and P. 292.

[8] Millington v. Griffiths, 30 L. T. 65; 23 Gas J. 215.

[9] Hipkins v. Birmingham, etc., Co., 5 H. and N. 74; 6 H. and N. 250; 9 Gas J. 63, 778; 30 L. J. Exch. 60; 9 W. R. 168. See also Parry v. Croydon Gas Co., 15 C. B. (N. S.) 568; 11 C. B. (N. S.) 578; 10 Jur. (N. S.) 172; 9 L. T. (N. S.) 694; 12 W. R. 212.

Where the defense was that the plaintiff did not use the water before it was befouled for domestic purposes, but for washing and flushing purposes, and for such purposes it was as fit as if it had not been fouled, the judge trying the case said: "A man is entitled to have the water for use in his own

§ 659. Pollution of running streams.

Questions of the pollution of running streams raise more difficult questions than those relating to the pollution of wells or springs. It is often difficult to reconcile the right of an upper riparian land owner to the use of the water passing in a stream through his estate, in the development of his land, with the right of a lower owner to receive the stream free from pollution. But a distinction must be drawn between the use and abuse of a running stream; as for instance, where it has become polluted by a usage of a part of the water which is returned to the stream in a polluted state, and where deleterious substances are thrown into it without any other use of it being made. Thus where manufacturers of gas threw coal tar and other noxious substances on their gas works premises near a stream and they percolated through the soil, into an adjoining river and rendered its water impure, it was held that the lower riparian land owner

house, even though for the purpose of washing or for the purpose of flushing his drains, uncontaminated by a disgusting smell of gas." Batcheller v. Tunbridge Wells Gas Co., 65 J. P. 680; 84 L. T. 765.

A license to take water from a well gives the licensee a right of action for the disturbance of his easement, but not for the well's pollution. Ottawa Gaslight Co. v. Thompson, 39 Ill. 598.

For similar cases, see Merrifield v. Lombard, 13 Allen 16; Richmond Mfg. Co. v. Atlantic DeLain Co., 10 R. I. 106; Stockport W. W. Co. v. Potter, 7 H. and N. 160; 7 Jur. (N. S.) 880; 31 L. J. Exch. 9; Pennington v. Brinsop Hall Co., L. R. 5 Ch. Div. 769; 46 L. J. Ch. 773. The owner of a well polluted is not bound to cement it in order to keep out the odors of gas or drainage from the gas works. Columbus, etc., Co. v. Freeland, 12 Ohio St. 392.

In Ottawa Gaslight and Coke Co v. Graham, 28 Ill. 73, it was held, in an action to recover damages for pollution of a well, that in ascertaining the true measure of damages the jury must consider all the circumstances connected with the injury, including the cost of securing a sufficient quantity of water equally pure with that supplied from the well before its injury, the cost of keeping the conductors and other machinery for so doing in repair, and the depreciation of the value of the property by reason of the erection of the gas works, but if the property would sell for the same amount, independent of a rise in similar property, then there would be no loss, but if it would not, then the difference would be the damages sustained. See also Ottawa Gaslight and Coke Co. v. Graham, 35 Ill. 346.

was entitled to have the water in a pure condition; and that the gas company was liable.[10] Pollutions arising from the working of coal mines furnish very good instances of the first class of instances we have referred to above. Thus where a mine owner used the water of a stream running through or by his premises to wash iron ore taken from his mine, without which right to so use the water the mine would be valueless, the stream being the only available water, and after using the water taken from the stream returned it, there being no other outlet for it, he resorting to the customary and best means of purifying it before permitting it to flow back into the stream, it was held that the interest of the public and of an important industry was such that the general rule with reference to the pollution of streams must be modified so as not to destroy that interest and such industry. "But there is a limit," said the court, "to this duty to yield, to this claim and right to expect and demand. The water course must not be diverted from its channel, or so diminished in volume, or so corrupted and polluted, as practically to destroy, or greatly to impair its value to the lower riparian owner." [11] In a Pennsylvania case it appeared that a coal mine owner, in the operation of his mine, pumped the water from a stream and returned it in such a state as to render the entire stream useless for domestic purposes; and it was held that the lower owner was without a remedy, his rights *ex necessitate* giv-

[10] Carhart v. Auburn Gaslight Co., 22 Barb. 297; Rex. v. Medley, 6 C. and P. 292 (indictment); Robinson v. Coal Co., 50 Cal. 460; People v. Gold Run, etc., Co., 66 Cal. 138; 4 Pac. Rep. 1152; Payne & Butler v. Providence Gas Co., 31 R. I. 295; 77 Atl. Rep. 145.

[11] Tennessee, etc., Co. v. Hamilton, 100 Ala. 252; 14 So. Rep. 167; Bear River, etc., Co. v. N. Y. Mining Co., 8 Cal. 327; Satterfield v. Rowan, 83 Ga. 187; 9 S. E. Rep. 677; Edwards v. Allouez Mining Co., 38 Mich. 46; Nelson v. O'Neal, 1 Mont. 284; Columbus, etc., Co. v. Tucker, 48 Ohio St. 41; 26 N. E. Rep. 630; Brown v. Torrence, 88 Pa. St. 186; Gallagher v. Kemmerer, 144 Pa. St. 509; 22 Atl. Rep. 970; Elder v. Lykens Valley Coal Co., 157 Pa. St. 490; 27 Atl. Rep. 545; Hindson v. Markle, 171 Pa. St. 138; 33 Atl. Rep. 74.

A city, under a statutory power to sue to restrain a nuisance to water courses connected with its water works, cannot, as a public agent, sue to restrain a public nuisance, such statute merely authorizing it to sue as an individual might for the protection of its private property. Newark, etc., Board v. Passaic, 45 N. J. Eq. 393; 18 Atl. Rep. 106.

ing way to the interests of the community, in order to permit the development of the natural resources of the country. In passing on the case the court said: "It will be observed that the defendants have done nothing to change the character of the water, or to diminish its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing on to the land artificially. The water as it is poured into Meadow Brook is the water which the mine naturally discharges; its impurity arises from natural, not artificial causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it. It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property. The defendants, being the owners of the land, have a right to mine the coal. It may be stated, as a general proposition, that every man has the right to the natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria,* for the rightful use of one's own land may cause damage to another without any legal wrong. Mining in the ordinary and usual form is the natural user of coal lands; they are, for the most part, unfit for any other use. 'It is established,' says Cotton, L. J., in West Cumberland Iron Co. v. Kenyon,[12] 'that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations.' In the same case, Brett, L. J., says: 'The cases have decided that where the maxim *sic utere tuo ut alienum non laedas* is applied to landed property, it is subject to a certain modification; it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.' The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to the ownership of coal property, and when exercised in the ordinary manner,

[12] L. R. 11 Ch. Div. 782; 48 L. J. Ch. 793; 40 L. T. 703.

and with due care, the owner cannot be held liable for permitting the natural flow of mine water over his own land, into the water course, by means of which the natural drainage of the country is affected. There are, it is well known, percolations of mine water into all mines; whether the mine be operated by tunnel, slope or shaft, water will accumulate, and, unless it can be discharged, mining must cease. The discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends; the discharge of the water is therefore part and parcel of the process of mining, and as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest of the State. The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned; they were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control; as the mining operations went on, the water by the force of gravity ran out of the drifts and found its way over the defendant's own land to the Meadow Brook. It is clear that for the consequences of this flow, which by the mere force of gravity, naturally, and without any fault of the defendants, carried the water into the brook and then to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants. But it does not appear from any evidence in this cause, that the mine was conducted by the defendants, in any but the ordinary and usual mode of mining in this country. The deeper strata can only be reached by shaft, and no shaft can be worked until the water is drawn. A drift is in some sense an artificial opening in the land and accumulates and discharges water in a greater volume and extent than would otherwise result from purely natural causes, yet mining by drift has, as we have seen, been held to be a natural user of the land. So, too, we think, according to the present practice of mining, the working of the lower strata by shaft, in the usual and ordinary way, must be considered the natural user of the land for the taking out of the coal, which can be reached by shaft only;

and, as the water cannot be discharged by gravity alone, it must necessarily, as part of the process of mining, be lifted to the surface by artificial means, and thence be discharged through the ordinary natural channels for the drainage of the country. We do not say that a case may not arise in which a stream, from such pollution, may not become a nuisance, and that the public interests as involved in the general health and well being of the community may not require the abatement of that nuisance. This is not such a case; it is shown that the community in and around the city of Scranton, including the complainant, is supplied with abundant pure water from other sources; there is no complaint as to any injurious effects from the water to the general health; the community does not complain on any grounds. The plaintiff's grievance is for a mere personal inconvenience, and we are of opinion that mere private personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."[13] A case of polluting a stream of water in the operation of an oil well arose in this same State. The owner of the well in boring it pumped a large quantity of salt water from it, into a storage tank, and this he drew off and allowed to flow by a natural depression over plaintiff's adjoining land. The plaintiff afterwards diverted it into a neighbor's brook, by plowing a ditch on his own land along the line of depression, thus rendering the water in the brook unfit for use. The owner of the well claimed he was exempt from liability under the case just quoted from, but the court did not so consider the matter, and in passing on the case said: "If the expense of preventing the damage . . . is such as practically to counterbalance the expected profit or benefit, then it is clearly unreasonable, and beyond what he could

[13] Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126; 6 Atl. Rep. 453; overruling same case as reported in 86 Pa. St. 401, and in 94 Pa. St. 302. Payne & Butler v. Providence Co., 31 R. I. 295; 77 Atl. Rep. 145.

The owner of cattle drinking from a stream flowing through his land may recover their value if they die from drinking the water where it has been polluted by the defendant; and he need not show they were in a healthy condition prior to the

justly be called upon to assume. If, on the other hand, however, large in actual amount, it is small in proportion to the gain to himself, it is reasonable in regard to his neighbor's rights, and he should pay it to prevent damage, or should make compensation for the injury done. Between these two extremes lies a debatable region where the cases must stand upon their own facts, under the general rule that can be laid down in advance, that the expense required would so detract from the purpose and benefit of the contemplated act as to be a substantial deprivation of the right to the use of one's own property. If damages could have been prevented short of this, it is *injuria* which will sustain an action." [14] But where the rights of the public are concerned, a different rule prevails than in instances of a private character. Thus where oil land owners in operating the land for oil, after the separation of the oil from the salt water, permitted the latter to run out upon the surface, and then to run into a stream from which a city drew its water supply, which was thereby rendered unfit for domestic use, the rules laid down above were held to not apply, the rights of the public standing on higher ground than the personal inconvenience and injury of a private citizen. The fact that the city was furnished water by a private corporation was held not to lessen the right of the public to insist that the water should not be polluted; but the court, in reversing the case, ordered an inquiry into the extent and value of the oil operations, whether the wells could be worked without the pollution of the stream, whether the water works company could obtain a supply elsewhere, and the probable expense.[15]

time they drank the polluted water. Benjamin v. Gulf C. & F. Ry. Co., 49 Tex. Civ. App. 473; 108 S. W. Rep. 408; Mexia L. & P. Co. v. Johnson (Tex. Civ. App.), 120 S. W. Rep. 534.

The owner of land poisoned by the overflow of a polluted stream may recover damages from the person polluting it; and in an action for that purpose he may show that the land became cloddy after it was poisoned, the size and existence of the clods being a circumstance to be considered in determining whether the agricultural value of the land was affected. Tennessee Coal, etc., Co. v. McMillion, 161 Ala. 130; 49 So. Rep. 880.

[14] Pfeiffer v. Brown, 165 Pa. St. 267; 30 Atl. Rep. 844; Hindson v. Markle, 171 Pa. St. 138; 33 Atl. Rep. 74.

[15] Commonwealth v. Russell, 172 Pa. St. 506.

Indictment lies for a pollution of a river with the refuse of gas works. Rex v. Medley, 6 C. and P. 292. See Manhattan Gaslight Co. v. Barker, 7 Robt. (N. Y.) 523; Indian Refining Co. v. Commonwealth, 134 Ky. 822; 117 S. W. Rep. 274.

§ 660. Pollution of subterranean waters.

A somewhat different rule applies to liability for the pollution of subterranean currents or streams of water. An English case furnishes an illustration of the modern rule with reference to the pollution of underground currents. The water for two wells, owned by two persons, was drawn from the same strata. The water in the lower well rose by natural pressure to within twenty-seven feet of the surface, and was then pumped out. This well was befouled by sewerage poured into the upper well by its owner. It was held that the owner of the lower well was entitled to an injunction to restrain the owner of the upper well from pouring sewage into it, or permitting it to run in — to prevent him so using his well as to pollute the lower well — and to recover damages for the injury he had already suffered. In passing on the case the court used the following language, from which it appears that the true cause of action was that the owner of the polluted well allowed his impure sewage to escape from his premises to the lower premises; and the fact that it reached the lower premises by an underground current instead of a surface stream was quite immaterial. "But it is equally clear that everyone has a right to appropriate percolating water, at all events whilst it is under his land. No one has any property in it — no one has any right to have it come on to his land, but everyone has an unlimited right to appropriate it whilst it is under his land, and may take it all, so as to prevent it going on to the land of others. His neighbor also below him has an equal right, before the person above has taken and appropriated it, to take it all. He has a right to take it to the extent that he may cause the water of the land above to come upon his land and to take it so, as to absolutely dry the land above. Therefore no one has any property in percolating water, but everyone has a right to appropriate the whole of it. Then arises the question as to whether, in respect of such water, any of those persons has any right whatever as against the others. I take it that this percolating water is a common reservoir or source in which no one has any property, but from which anyone has a right to appropriate any quantity. Then the question is whether anyone who has that unlimited right at appropriation, but has no greater rights than any of the others

who have it, has a right to contaminate the common reservoir, or whether he is bound not to do anything which shall prevent, not only his immediate neighbors, but anyone of those who have that unlimited right, from obtaining its true value. It is said that the defendant in polluting this common source, did not pollute that in which the plaintiff had any property. That is true. If all the plaintiff can show is that the common source was contaminated, he cannot before he has appropriated any part of it, maintain any action in respect of the contamination. I do not think that a man can, by experimenting off or on his own land, and finding that the water was contaminated before it came on to his land, maintain an action, for the water did not belong to him, and he had not appropriated it. But it does not follow that he cannot maintain an action when he has appropriated it, and finds that the water which he had a right to appropriate, has been contaminated by that which another person has done to the common source; that is, although no one has any property in that source, yet inasmuch as everyone has a right to appropriate it, he has a right to appropriate it in the natural state, and no one has a right to contaminate the common source so as to prevent his neighbor having his right of appropriation. The next point was that, assuming that to be true, yet, if the person who has that right of appropriation can only exercise it, or has done so by artificial means, the water he took would not have been contaminated, then the percolated water which he got, must be said to have been polluted by his act, and, therefore, he could not maintain an action. I cannot think that that is a true proposition. The question of natural, as distinguished from unnatural user, never applies to a plaintiff. A man has a right to exercise that natural user with all the skill of which he is capable. That question is applicable to a defendant. Therefore, it seems to me, that as long as a plaintiff does not use any means which, as regards his neighbor, are unlawful, but only uses lawful means, however artificial or extensive those means may be, he has a right to use them, and the right to appropriate the common source is not diminished by reason of using those means. Therefore, however he may appropriate the water from the common source, he has a right to have that source uncontaminated by any act of any other person. The question of natural or unnatural user only goes to

this, that, although a defendant does contaminate water or anything else which goes on to his neighbor's land, yet, if that act is only the natural user of the land, then, although by that act he does injure his neighbor, he is not liable, because otherwise he cannot use his land at all. I must say, further, with regard to this common source in respect of which a right of appropriation belongs to every one, the question does not depend upon persons being contiguous neighbors, but if it can be shown that in fact the defendant has contaminated the common source, it signifies not how far the plaintiff is from him, if it is proved that he has been injured by what the defendant has done." [16] There are cases, however, which hold that a land owner is not liable to another land owner injured by noxious substances placed on his land which penetrate to subterranean streams and are carried on to the land of such other land owner by such streams, to his damage; and the fact that he continues to place such noxious substances on his land after he is informed of the damage they are inflicting upon his neighbor, will not render him liable for the damage inflicted after receiving such notice.[17] But the true rule would seem to be that the pollution of subterranean streams will not render anyone causing it liable until he is informed of the damage such pollution is causing, and from thence on he will be liable.[18]

§ 661. Damages occasioned by storing or bringing oil on land.

Every one who brings oil or stores it on land must confine it securely in pipes, tanks or reservoirs, or at least not permit it to escape on to the land of another, whether by flowing over the surface or percolating through the soil, and if he do not, even though guilty of no negligence, he will be liable for what-

[16] Ballard v. Tomlinson, 29 Ch. Div. 115; 54 L. J. Ch. 454; 52 L. T. 942; 33 W. R. 533; 49 J. P. 692; 24 Am. L. Reg. 634. See Womersley v. Church, 17 L. T. (N. S.) 190; King v. Oxford Co-operative Society, 51 L. T. 94; Ball v. Nye, 99 Mass. 582; Curhart v. Auburn Gaslight Co., 22 Barb. 297.

[17] Brown v. Illius, 27 Conn. 84; Dillon v. Acme Oil Co., 49 Hun 565.

[18] Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126; 6 Atl. Rep. 453. See Kennard v. Standard Oil Co., 89 Ky. 468; 12 S. W. Rep. 937; 7 L. R. A. 451, where knowledge that its oil was damaging a spring of water was held not necessary, in order to render the oil company liable.

ever damages is suffered by the oil escaping.[19] This is true of a refining company, although the business of refining oil is perfectly legitimate; yet it must not permit the oil to escape from its premises.[20] If the owner of the oil contaminate on his own ground the sources of a spring or well on the ground of another, by spilling or pouring oil upon his own ground, he will be liable to the owner of such spring or well, to the extent of the damage done.[21]

§ 662. Gases destroying trees and vegetation.

The fumes and gases flowing from the manufacture of gas are often so strong and noxious as to destroy or injure vegetation and crops. When such is the case the person injured is not only entitled to recover damages which he has thus suffered, but also may maintain an action to enjoin the further manufacture of gas in a manner injurious to his trees, vegetation or crops; and usually mere delay in bringing the suit cannot be taken as an acquiescence in the conduct of the gas manufacturer.[22] But where vapors from large copper works were injurious to trees, the court instructed the jury that, although every man must so use his property as to not injure the property of another, yet the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view, and therefore in a case of injury occasioned by noxious vapors from a manufactory, to be actionable, the injury must be such as to visibly

[19] Hauck v. Tidewater Pipe Line Co., 153 Pa. St. 366; 26 Atl. Rep. 644; 20 L. R. A. 642; McGregor v. Camden, 47 W. Va. 193; 34 S. E. Rep. 936; Houston & T. C. R. Co. v. Crook, 56 Tex. Civ. App. 28; 120 S. W. Rep. 594.

[20] Gavigan v. Atlantic Rep. Co., 186 Pa. St. 604; 40 Atl. Rep. 834; *Contra*, Dillon v. Acme Oil Co., 49 Hun 565.

Nor must a railroad company permit it to escape from its premises, although it be impossible to transfer it into the tanks without leakage. Houston & T. C. R. Co. v. Crook, 56 Tex. Civ. App. 28; 120 S. W. Rep. 594.

[21] Kennard v. Standard Oil Co., 89 Ky. 468; 12 S. W. Rep. 937; 7 L. R. A. 451; Berger v. Minneapolis, etc., Co., 60 Minn. 296; 62 N. W. Rep. 336; Brady v. Detroit, etc., Co., 102 Mich. 277; 62 N. W. Rep. 687; 26 L. R. A. 175.

The owner of a frame automobile garage, adjacent to other frame buildings, licensed to store one barrel in the building, will be enjoined from introducing gasoline into the tanks of the automobiles inside the building, and from storing automobiles with gasoline in the tanks inside the building. O'Hara v. Nelson, 71 N. J. Eq. 161; 63 Atl. Rep. 836.

[22] Broadbent v. Imperial Gaslight Co., 7 H. L. Cas. 600; 3 Jur. (N. S.) 221; 5 Gas J. 342; 9 Gas J. 751; affirming 7 DeG. M. and G. 436; 26 L. J. Ch. 276; 5 Jur. (N. S.) 1319; Sholts Iron Co. v. Inglis, L. R. 7 App. Cas. 518.

diminish the value of the property; that the locality and all other circumstances must be taken into consideration, and in vicinities where great manufacturing works had been and were being carried on, parties must stand on extreme rights. On appeal this direction was held to be a correct statement of the law.[23] Where the damages are slight, or out of all proportion to the damages that would be inflicted by enjoining the manufacture of the product sought to be enjoined, the court will refuse the injunction and leave the complainant to his action for damages.[24] Damages have been allowed for grain injured by gases escaping from a brick kiln,[25] so from coke ovens.[26]

§ 663. Noisome smells.

Unwholesome and noisome smells proceeding from the manufacture of gas will render the manufactor liable in damages, if sufficient to produce deleterious results upon the persons living in the region affected by them. "Gas works," said the court, "are to be placed in the class of erections which are not within the ordinary and usual purposes to which real estate is applied, and whenever they create a special injury they are to be regarded as a private nuisance, for which an action will lie in respect to the special injury, *e. g.*, a swine sty,[27] a lime kiln,[28] a dye house,[29] a tallow chandler, a furnace,[30] a coke oven,[*30] a brew house,[31] a fertilizing plant,[*31] or a tannery."[32] It is suf-

[23] St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; 35 L. J. Q. B. 66; 11 Jur. (N. S.) 785; 12 L. T. (N. S.) 776; 13 W. R. 1083. See Sturges v. Bridgman, 11 Ch. Div. 852; 48 L. J. Ch. 785; 41 L. T. 219; 28 W. R. 200. See a like ruling. People v. Transit Development Co., 131 N. Y. App. Div. 174; 115 N. Y. Supp. 297.

[24] Cooke v. Forbes, L. R. 5 Eq. 166; 37 L. J. Ch. 178; 17 L. T. (N. S.) 371; Attorney General v. Manchester Corporation [1893], 2 Ch. 87; 62 L. J. Ch. 459; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343; 3 R. 427.

[25] Fogarty v. Junction City, etc., Co., 50 Kan. 478; 31 Pac. Rep. 1052; 18 L. R. A. 756. See Campbell v. Seaman, 63 N. Y. 568; 20 Am. Rep. 567; Miller v. I. P. Thomas & Son, 89 N. J. L. 364; 98 Atl. 192.

[26] Robb v. Carnegie, 145 Pa. St. 324; 22 Atl. Rep. 649; 14 L. R. A. 329.

[27] 9 Rep. 59.

[28] 2 Black 141.

[29] Hutt 136.

[30] Cro Car 570.

[*30] McClung v. North Bend, etc., Co., 31 Wkly. L. Bull. 9; 9 Ohio Cir. Ct. Rep. 259; 6 Ohio Cir. Dec. 243; 1 Ohio Dec. 247.

[31] R. Pal. 139; Hutt 136.

[*31] Fertilizing Co. v. Hyde Park, 97 U. S. 659.

[32] Carhart v. Auburn Gaslight

ficient that the manufacture of gas creates smells, smokes, and noxious odors, so annoying to an individual residing near the company's works as to render his premises uncomfortable for habitation. In such an instance there is a private nuisance, for which the company is liable.[33] It is immaterial that the gas company used due care to prevent the escape of gas; for it is the invasion of the premises of another that gives the right of action.[34] The rule extends even to the manufacturers of fertilizers and phosphates from which gases escape and affect the paint of houses nearby, and eat the nails of shingles so as to render them loose, and make living in the house uncomfortable and unhealthy, or has driven away customers from the plaintiff's store.[35] Mere annoyance may not, however, be sufficient, especially if the action is to enjoin the use of the plant. Some gas will necessarily escape; and any smell of gas is annoying, though not necessarily unhealthy to that degree that it will affect the health of the person it reaches.[36] Indeed, the rule has been laid down that to entitle the owner of a dwelling to damages from the storing of oil adjacent to his house, he must suffer substantial and actual injuries in the necessary and reasonable use of his house, his physical comfort or his health, and that mere discomfort and inconvenience are not sufficient to entitle

Co., 22 Barb. 297, citing Thomas v. Brackney, 17 Barb. 654. See Butchers' Union Co. v. Crescent, etc., Co., 111 U. S. 746.

[33] Ottawa Gaslight Co. v. Thompson, 39 Ill. 598; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201; McGregor v. Camden, 47 W. Va. 193; 34 S. E. Rep. 936; Robb v. Carnegie, 145 Pa. St. 324; 22 Atl. Rep. 649; 14 L. R. A. 329; Dorr v. Dansville Gaslight Co., 18 Hun 274.

[34] Hauck v. Tidewater, etc., Co., 153 Pa. St. 366; 26 Atl. Rep. 644; 20 L. R. A. 642; Bohan v. Port Jarvis Gas Co., 122 N. Y. 18; 25 N. E. Rep. 246; 9 L. R. A. 711; Rosenheimer v. Standard Gaslight Co., 36 N. Y. App. Div. 1; 55 N. Y. Supp. 192; People v. New York, etc., Co., 64 Barb. 55; Carmichael v. Texarkana, 94 Fed. Rep. 561; Grange v. Pately, etc., Co., 14 Gas J. 309; Ottawa Gaslight Co. v. Graham, 28 Ill. 73; Friburk v. Standard Oil Co., 66 Minn. 277; 68 N. W. Rep. 1090.

[35] Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562; 39 Atl. Rep. 270.

[36] Pottstown Gas Co. v. Murphy, 39 Pa. St. 257.

him to relief.[37] If the manufacture of the gas be a continuing injury, a court of equity will restrain its manufacture in a manner injurious to the plaintiff or his property.[38] Injunction, however, will not be granted to restrain the drilling of a gas well near a dwelling house, on account of the prospective noise, stench, pollution of the air, and the danger from fire, explosion, and lightning that would result from the operation of the well at that place, or on account of the overflow of water or oil from it, at least where it is not certain that any water, oil, or gas will be found there; and it is not shown that the gas well could not be so managed as not to be more than slight or barely possible danger or annoyance.[39]

§ 664. Odors from operation of oil wells and works.

The owner of property injured by the operation of oil wells or works is not confined to instances where the oil actually enters upon his premises; but he may recover because of noxious odors occasioned by their operation, rendering his premises unhealthy or objectionable to live upon. Slight evidence is sufficient to make out a case for the jury. Thus where it was shown that an oil company spilled oil on its own land adjoining a lot on which a residence was located, and the wind blowing from the direction of the oil premises rendered the residence

[37] Gavigan v. Atlantic Refining Co., 3 Lack. L. News 371. See this case on appeal. See Friburk v. Standard Oil Co., 66 Minn. 277; 68 N. W. Rep. 1090.

[38] Broadbent v. Imperial Gaslight Co., 7 H. L. Cas. 600; 3 Jur. (N. S.) 221; 9 Gas J. 751; affirming 7 De Gex, M. and G. 436; 26 L. J. Ch. 276; 5 Jur. (N. S.) 1319; Wragg v. Commercial Gas Co., 33 Gas J. 119, 313; Attorney General v. Gaslight Co., L. R. 7 Ch. Div. 217; 47 L. J. Ch. 534; 37 L. T. 746; 26 W. R. 125. See Butt v. Imperial Gaslight and Coke Co., L. R. 2 Ch. 158; 14 L. T. R. 349; 15 Gas J. 139; McClung v. North Bend, etc., Co., 9 Ohio Cir. Ct. Rep. 259.

[39] Windfall Mfg. Co. v. Patterson, 148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381; 62 Am. St. Rep. 532; McGill v. Pintsch Compressing Co., 140 Iowa 429; 118 N. W. Rep. 786 (smoke); Judson v. Los Angeles, etc., Co., 157 Cal. 168; 106 Pac. Rep. 581 (smoke and noise from a gas factory); McCalla v. Louisville & N. R. Co., 163 Ala. 107; 50 So. Rep. 971.

The gas company cannot escape liability by showing that the plaintiff produced other noxious odors in his business which contributed to render his premises unwholesome, unless it is also shown that the injury complained of was the result of the combinations of both of the noxious odors, and that those created by the gas company were not independently offensive. Brown v. Illius, 27 Conn. 84.

unhealthy to the occupants, his family suffering in consequence thereof, it was held that there was a case made for the jury.[40] Anything that deprives the occupant of the full use and enjoyment of his property, as making him or his family sick, is actionable, even though the business be a lawful one.[41] The damages may be occasioned merely by the offensive odors, the oil never reaching the premises of the plaintiff, and the recovery may be not only for discomforts suffered,[42] but even damages to his business, by driving away customers.[43] Naphtha tanks may give such offensive odors as to render damages to a nearby residence, and give the owner a cause of action for them.[44] In order to entitle an owner of a dwelling to damages occasioned by the storage of oil adjacent it, he must show that he has suffered actual and substantial injuries in the reasonable and necessary use of his home to his physical comfort or his health, and it is not enough to show mere inconvenience and discomfort.[45]

§ 665. Other disagreeable odors in neighborhood.

On the principle that one man cannot justify his conduct by the wrongful conduct of another, it is no defense, in an action to enjoin the operation of gas works in a certain manner, that the neighborhood already contained establishments devoted to noxious and disagreeable trades, unless by long continuance such neighborhood has been so entirely given up to such estab-

[40] Friburk v. Standard Oil Co., 66 Minn. 277; 68 N. W. Rep. 1090; Hauck v. Tidewater Pipe Line Co., 153 Pa. St. 366; 26 Atl. Rep. 644.

[41] Gavigan v. Atlantic Ref. Co., 186 Pa. St. 604; 40 Atl. Rep. 834.

[42] Berger v. Minneapolis, etc., Co., 60 Minn. 296; 62 N. W. Rep. 336.

[43] Brady v. Detroit, etc., Co., 102 Mich. 277; 60 N. W. Rep. 687; 26 L. R. A. 175. There must be evidence to show the loss to the business. Keiser v. Mahanoy Gas Co., 143 Pa. St. 276; 22 Atl. Rep. 759.

[44] Bohan v. Port Jervis Gas Co., 122 N. Y. 18; 25 N. E. Rep. 246; 9 L. R. A. 711.

[45] Gavigan v. Atlantic Refining Co., 3 Lack. L. News 371; 2 Lack. L. News 239. See this case in 40 Atl. Rep. 834; 186 Pa. St. 604.

Merely allowing oil to stand in a pipe line lawfully laid beneath the surface of the street is not a nuisance, even so volatile oil as naphtha. Lee v. Vacuum Oil Co., 54 Hun 156; 7 N. Y. Supp. 426.

Injunctive relief to the State of Georgia against the discharge of obnoxious gases from copper smelters in Tennessee in such quantities as are destructive to vegetation in Georgia, awarded on final decree. Georgia v. Tennessee Copper Co., 240 U. S. 650; 36 Sup. Ct. 465.

lishments that an addition to them would not add to the discomfort.[46]

§ 666. Degree of annoyance.— Question for jury.

It is not every annoyance that will give a right of action to the person annoyed. A nuisance is a "thing which will offend an ordinary man, and not a delicate-nosed person."[48] There are many persons who would be annoyed by gas works being built in the near neighborhood to their dwelling, while others would regard it as a matter of indifference. In instances of charges of nuisance the question is whether the acts done would annoy the average man — they might annoy some and not annoy others like situated; and it is a question for the jury[49] what amount of annoyance will constitute a nuisance that will give a cause of action to the person annoyed. A property owner is entitled to enjoy his property as it was before the gas works were erected; but it is error to say that he, in the enjoyment of his property is entitled to the same enjoyment as that ordinarily enjoyed by other persons in his neighborhood similarly situated, for the actual question for the jury is not a comparison of his condition with that of his neighbors, but whether the conduct of the gas company caused him an actual damage.[50] A gas company is responsible in damages for the ordinary smells that usually proceed from such works if they constitute a nuisance; and the fact that it is not negligent does not protect it from liability, if, even in its usual course of business, it injure others.[51]

[46] Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201.

[48] Tilly v. Slough Gas and Coke Co., 17 Gas J. 231. See Pottstown v. Murphy, 39 Pa. St. 257.

[49] Rex v. Medley, 6 C. and P. 292.

[50] Columbus, etc., Co. v. Freeland, 12 Ohio St. 392; McGill v. Pintsch Compressing Co., 140 Iowa, 429; 118 N. W. Rep. 786; Judson v. Los Angeles, etc., Co., 157 Cal. 168; 106 Pac. Rep. 581.

[51] Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Foor v. Edwards, 45 Ind. App. 259; 90 N. E. Rep. 785; Sherman Gas & El. Co. v. Belden, 103 Tex. 59; 123 S. W. Rep. 119; reversing 115 S. W. Rep. 897; Western Texas Compress Co. v. Williams, 103 Tex. Civ. App. 59; 124 S. W. Rep. 493.

§ 667. Gas or oil well near house or building.

The operation of a gas or oil well in close proximity to a dwelling house or store may amount to a nuisance, the same as the operation of a noisome trade. Each particular case must stand upon its own facts. Thus, in one of the Circuit Courts of Ohio it was held that the drilling and operation of an oil well on a city lot, close to a dwelling house situated on the adjoining lot, was dangerous and annoying, practically destroying the house for the purpose of living in it so long as the well was operated; and if it were shown that an action for damages would be inadequate, a perpetual injunction would be granted, prohibiting its operation.[52] In Pennsylvania it was held that an oil well located seventy feet and an oil tank eighty feet from a dwelling house was not a nuisance *per se;* but if the escape of gases from it was so great as to require the fires at times in the house to be extinguished in order to prevent an explosion, then the well became a nuisance in fact, and its operation might be enjoined.[53] So in Indiana it was held that the drilling of a gas well within one hundred and fifty-two feet of a dwelling house would not be enjoined on account of the noise, pollution of the air, danger from fire or explosion that would result from the operation of the well, or on account of water or oil from the well, if it be not shown with certainty that water, oil, or gas would be found, and also if it be not shown that the gas well could not be operated in such a manner as to avoid the injuries apprehended. "In the case at bar," said the court, "the appellant, in locating its brick and tile works, for which natural gas was to be used as fuel, selected a place retired from all residences, and there erected its plant and machinery at great expense. The business so commenced was continued three years before the appellees came and erected their dwelling upon land across the highway from appellant's land and within 200 feet of its brick and tile works. Certainly, therefore, unless the works should constitute a nuisance *per se*, or unless they were so conducted as to become a nuisance in fact, the appellees are not

[52] See § 884. Cline v. Kirkbindoe, 12 Ohio C. C. Dec. 517; 22 Ohio Cir. Rep. 527.

[53] McGregor v. Camden, 47 W. Va. 193; 34 S. E. Rep. 936.

in a position to demand that equity restrain the appellant in the use of its property. A nuisance *per se,* as the term implies, is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. Such a nuisance is a disorderly house, or an obstruction to a highway, or to a navigable stream. But a business lawful in itself cannot be a nuisance *per se,* although, because of surrounding places or circumstances, or because of the manner in which it is constructed, it may become a nuisance. Certain kinds of business or structures, as powder houses, or nitroglycerine works, are so dangerous to human life that they may be maintained only in the most remote and secluded localities. Others, as slaughter houses and certain foul-smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even from the near neighborhood of family residences. Yet there must be some proper place where every lawful business may be carried on, without danger of interference on the part of those who, in some slight degree, may be annoyed or endangered by the nearness of the objectionable occupation. Of course, all persons have the right to insist that a business in any degree offensive or dangerous to them shall be carried on with such improved means and appliances as experience and science may suggest or supply, and with such reasonable care as may prevent unnecessary inconvenience to them. By such care and improved methods and appliances, many occupations formerly regarded as nuisances may now be carried on, even in populous neighborhoods, without annoyance to anyone. So, an establishment in some degree offensive, as a livery stable, may be kept so cleanly, so free from anything to offend the sense of sight or of smell, that the proprietor may invite his most fastidious visitors to any part of it; although the same establishment might also be so kept as to be an abomination even to the passerby upon the highway. It cannot be said that a plant for the manufacture of brick and drain tile, or even a gas well sunk to supply fuel for such a plant, is a nuisance *per se.* The business is lawful, and, if located in a proper place, and conducted and maintained

in a proper manner, neither the plant nor the well can be treated as a nuisance. Appellees voluntarily selected the neighborhood of appellant's plant for their residence, three years after the appellant began business there; and while this circumstance is not controlling, yet it is one that must be taken into consideration. Nor will it be sufficient answer that appellant's gas well was on the east side of the brick yard at the time the appellees selected their home on a lot within 200 feet of the factory. Experience has shown that gas wells are of short life, and that, after the failure of one well, another, in order to be successful, must be located at a considerable distance from the first. It is averred that there was room for but two wells on this twenty-two-acre tract, and that the location of the proposed well is the farthest possible from the first well and the best that could be selected. It is, besides, admitted by the demurrer to the answer that the appellee, Willard E. Patterson, agreed that the second well should be located within 150 feet of his house; and, while it is possible that such agreement might not bind his co-appellee, yet the circumstance shows that the appellant, in locating its wells at the distance of 152 feet from the appellees' dwelling, was proceeding carefully and with due regard to appellees' rights. Unless, therefore, it should be made to appear that the gas well could not be so managed and maintained as not to be of more than slight or barely possible danger or annoyance to appellees, it does not seem that they could have any sufficient cause to ask that the sinking of the well be restrained. The record does not show, nor have we any means of knowing, that a well at a distance of 152 feet, or over nine rods, from a dwelling house, cannot be so maintained and cared for as not to cause the injury and annoyance claimed to be threatened to appellees in this case. It is remembered that before a court of equity will restrain a lawful work, from which merely threatened evils are apprehended, the court must be satisfied that the evils anticipated are imminent and certain to occur. An injunction will not issue to prevent supposed or barely possible injuries. In the case before us, it is not shown that even if the gas well were in operation it could not be so managed and cared

for as to avoid all the injuries apprehended. But, more than this, there might never be any gas found in the well. This, the appellees practically concede, when they recite that, although gas might not be found, yet that oil, or even water, coming from the well would be dangerous to their residence. This is altogether too speculative. If the appellant company is willing to invest its money in a well from which may be brought to the surface of the earth an uncontrollable element productive of the evils feared by appellees, it must be allowed to do so at the hazard to itself of all the consequences for which it would thus become liable. But if the well may be sunk, and the gas, oil or water therefrom, if any, can be so controlled and managed as to cause no appreciable injuries to appellees or to anyone else, then such reasonable and lawful use of property ought not to be prevented by the courts. To do so would be sheer usurpation of arbitrary power."[54]

§ 668. Business authorized by government no defense.

A gas company cannot successfully defend against the charge of a nuisance on the ground that its business has been authorized by the government or by the legislature, even though it be chartered by a special act of the legislature and empowered to conduct its business where its works are located. Such a charter authorizes it to conduct its business in a lawful and not an unlawful manner. Works authorized by the legislature and carried on without negligence may in fact involve a nuisance for which the company will be liable. Thus where in a special act of parliament incorporating a gas company it was enacted that the gas should be of a certain purity, it was held that the company was not justified in causing a nuisance, even if the gas could not be made of a sufficient purity without so doing.[55]

[54] Windfall Mfg. Co. v. Patterson, 148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381; 62 Am. St. Rep. 532. The drilling of a well on adjoining land in close proximity to plaintiff's producing well cannot be enjoined, on the danger of ignition of gas by the fires used in drilling the other well, where such danger would arise only if it became necessary to open the producing well to repair the pump in case of accident, which is only a possible contingent danger. Pope v. Bridgewater Gas Co., 43 S. E. 87; 52 W. Va. 252.

[55] Attorney General v. Gaslight and Coke Co., L. R. 7 Ch. Div. 217; 47 L. J. Ch. 534; 37 L. T. 746; 26 W. R. 125; Brand v. Hammersmith Rail Co., L. R. 4 H. L. 171; 38 L. J. Q. B 265; 21 L. T. (N. S.) 238; 18 W. R. 12 (vibration caused without negligence, by the passing of trains after the railway is brought into use); London, etc., R. R. Co. v. Truman, 11 App. Cas. 45;

But if the particular location of the gas company's works has been expressly authorized by its charter or a statute, then the person damaged must show that the company has been guilty of negligence in the conduct of its works.[56] The fact that a gas company has a contract to light the streets of a city and that if it be enjoined it will not be able to carry out its contract with the city, and virtually with the public, is no defense.[57]

§ 669. Duty of owner to prevent continuance of damages.

The owner of property whose rights to it have been wrongfully invaded by a gas company is not required to take active steps to abate the nuisance created or to lessen the damages. It can neither justify its conduct nor lessen its liability by setting up the property owner's failure to assume an active role in order to reduce its liability. Thus, it was held that a well owner was not bound to cement his well in order to prevent foul water entering it from the gas works.[58] But if he does take active steps to abate the nuisance or prevent the incurring of damages, in an action for such damages as he has suffered, he may recover whatever outlay he was put to, whether successful or not, in so far as the efforts made might reasonably be expected to remedy the evil.[59] But he cannot recover for damages to his horses occasioned by their drinking water polluted by a gas company,

55 L. J. Ch. 354; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388 (a yard for cattle traffic which was a nuisance to neighbors); Metropolitan Asylum District Managers v. Hill, 6 App. Cas. 193; 50 L. J. Q. B. 353; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664 (a water right); Parry v. Croydon Gas Co., 15 C. B. (N. S.) 568; 11 C. B. (N. S.) 578; 10 Jur. (N. S.) 172; 9 L. T. (N. S.) 694; 12 W. R. 212 (penalty); Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Bohan v. Port Jarvis Gas Co., 122 N. Y. 18; 25 N. E. Rep. 246; 9 L. R. A. 711; Rosenheimer v. Standard Gaslight Co., 36 N. Y. App. Div. 1; 55 N. Y. Supp. 192; People v. N. Y. Gaslight Co., 64 Barb. 55; 6 Lans. 467; Watson v. Gas Co., 5 U. P. Q. B. (Can.) 262; Bohan v. Port Jarvis Gaslight Co., 45 Hun 257; Batchelder v. Tunbridge, etc., Co., 84 L. T. 765; 65 J. P. 680.

56 Bohan v. Port Jarvis Gaslight Co., 45 Hun 257.

57 Terre Haute Gas Co. v. Teel, 20 Ind. 131.

58 Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201.

59 Sherman v. Fall River Iron Works, 2 Allen 524; 79 Am. Dec. 799; Benjamin v. Gulf C. & S. F. Ry. Co., 49 Tex. Civ. App. 473; 108 S. W. Rep. 408. See Ottawa Gaslight and Coke Co. v. Graham, 28 Ill. 73.

if he permit them to drink the water after he knows of its pollution.[60] But it has been held that the owner of hogs need not remove them from his field through which a stream is running that has been polluted, though he knows they are dying from drinking the polluted water.[60a] This is especially true if he had no other water for them to drink.[60b] But in the case of a polluted spring, if the owner could by ordinary care and reasonable cost have cleaned it out and thus restore it to its original condition, he can recover only for the pollution up to the time he could have cleaned it.[60c]

§ 670. Evidence.

Evidence on the part of the gas company is not admissible to show that it has so improved its works that they no longer are a nuisance, where the improvement is made after the suit, unless it is sought to recover damages claimed to have been incurred after such improvement was made, and then, of course, only in rebuttal of the claim that damages were incurred during that period. In other words, if the defendant admit that the damages were incurred, then the evidence is not admissible, for, as we have seen, the operation of gas works in a city is a nuisance if they cause a special injury.[61] And the claim that they were not a nuisance at the time the injury was rendered, because of improvements introduced, is not admissible in evidence as a defense.[62] If the action is to recover damages because of the contamination of a well, testimony concerning the condition of water in wells on other premises in the neighborhood is admissible, in order to show the extent and character of the injury sustained by the plaintiff, and also as tending to show that the operation of a gas

[60] Sherman v. Fall River Iron Works, 2 Allen 524; 79 Am. Dec. 799.

[60a] Mexia L. & P. Co. v. Johnson (Tex. Civ. App.), 120 S. W. Rep. 534.

[60b] Benjamin v. Gulf C. & S. F. Ry. Co., 49 Tex. Civ. App. 473; 108 S. W. Rep. 408.

[60c] Cincinnati, N. O. & T. P. Ry. Co. v. Gillespie, 130 Ky. 213; 113 S. W. Rep. 89.

The amount of damages recoverable for injury to cattle is the difference between their value after the poisoning and the value immediately before the poisoning. Benjamin v. Gulf C. & S. F. Ry. Co., *supra*.

[61] Cahart v. Auburn Gaslight Co., 22 Barb. 297.

[62] Watson v. Gas Co., 5 U. P. Q. B. (Can.) 262.

plant could-produce the injury of which complaint is made.[63] On the part of the defense it may be shown that other substances contaminated the well other than those coming from the gas works, in order to reduce the damages; for the plaintiff cannot recover for injuries inflicted by others, although they were incurred at the same time the injuries were inflicted by the defendant.[64]

§ 671. Injunction.

An action for an injunction lies to prevent the continuance of a nuisance caused by the operation of gas works,[65] usually against the manner in which they are being conducted and not generally against their operation.[66] And if necessary to afford full relief the court may issue a mandatory injunction.[67] But it must be borne in mind that an injunction will not be granted where the alleged injury is trifling and transient.[68] Thus, where it appeared, owing to the company's precautions, that only on three occasions had an appreciable escape of gas taken place, and then only from accidental defects which were immediately remedied, an injunction was refused, without prejudice to bring an action at law to recover the damages sustained.[69] Any one seeking to restrain an alleged future nuisance must make a strong case of probability, that the apprehended mis-

[63] Belvidere Gaslight and Fuel Co. v. Jackson, 81 Ill. App. 424; Ottawa Gaslight and Coke Co. v. Graham, 35 Ill. 346.

[64] Sherman v. Fall River Iron Works Co., 5 Allen 213.

[65] Imperial Gaslight Co. v. Broadbent, 7 H. L. Cas. 600; 29 L. J. Ch. 377; 5 Jur. (N. S.) 1319; 7 De Gex MacN. and G. 436; 5 Gas J. 342; 9 Gas J. 751; Manhattan Gaslight Co. v. Barker, 7 Robt. (N. Y.) 523; Tenant v. Goldwin, 1 Salk. 21, 360; 2 Ld. Raym. 1089; New Orleans v. Gaslight Co., 5 La. Ann. 439.

[66] Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201; Wragg v. Commercial Gas Co., 33 Gas J. 119, 313; Attorney General v. Gaslight and Coke Co., 7 Ch. Div. 217; 30 Gas J. 791, 827; Butt v. Imperial Gaslight Co., L. R. 2 Ch. 158; 14 L. T. Rep. 349; 15 Gas J. 139.

[67] Hendrie v. Lea Bridge, etc., Co., 21 Gas J. 949, 989.

[68] Attorney General v. Cambridge, etc., Co., L. R. 4 Ch. 71; 38 L. J. Ch. 94; 19 L. T. (N. S.) 508; 17 W. R. 145.

[69] Cooke v. Forbes, L. R. 5 Eq. 166; 37 L. J. Ch. 178; 17 L. T. (N. S.) 371.

chief will in fact arise.[70] Of course, an actual befouling of a stream may be enjoined in a proper case,[71] especially where the damages would be inadequate.[72] If the contaminated water will be deprived of its noxious qualities before it reaches the land of the plaintiff an injunction will be denied.[73]

§ 672. Enjoining erection of gas plant.

An action will not lie to enjoin the erection of gas works near a dwelling, on the theory that the reservoirs to contain the gas are liable to explode and injure such house and those residing in it. It is the manner in which the gas works will be conducted that must be shown in order to obtain an injunction; for it is a matter of notoriety that gas works can be so conducted as to not seriously annoy those in the neighborhood, although persons sensitive to the odors necessarily escaping may object.[74] A gas factory may be a nuisance to those residing in a dwelling near by, though the noise and

[70] Attorney General v. Manchester Corporation [1893], 2 Ch. 87; 62 L. J. Ch. 459; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343; 3 R. 427. See Windfall Mfg. Co. v. Patterson, 148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381; 62 Am. St. Rep. 532.

Where a prescriptive right to befoul a stream has been acquired, the fouling must not be enlarged to the prejudice of others. Crossley v. Lightowler, L. R. 2 Ch. 478; 36 L. J. Ch. 584; 16 L. T. (N. S.) 638; 15 W. R. 801; Baxendale v. McMurray, L. R. 2 Ch. 790; 16 W. R. 32.

An injunction will be issued to restrain the introduction of gasoline into tanks of automobiles inside of a frame building adjacent to other frame buildings on three sides, and from storing automobiles with gasoline in their tanks inside of the building. O'Hara v. Nelson, 71 N. J. Eq. 629; 63 Atl. Rep. 842.

[71] Clowes v. Staffordshire W. W. Co., L. R. 8 Ch. 125; 42 L. J. Ch. 107; 27 L. T. 521; 21 W. R. 32.

[72] Pennington v. Brinsop Coal Co., 5 Ch. 769; 46 L. J. Ch. 773; 37 L. T. 149; 25 W. R. 874.

[73] Elmhirst v. Spencer, 2 MacN. & G. 45; Wood v. Waud, 3 Exch. 748; 18 L. J. Exch. 305; 13 L. T. 212; 13 Jur. 742.

An action lies to prevent hot water being poured into a stream; yet if it reaches a natural temperature before entering on the plaintiff's land, there is no damage. Mason v. Hill, 3 B. and Ad. 304; 5 B. and Ad. 1; 2 N. and M. 747; 2 L. J. K. B. 118.

See where a combustible gas tank was held to be a nuisance, making the owner liable for injuries resulting from its explosion. Levine v. New York Cent. & H. R. R. Co., 133 N. Y. Supp. 467.

[74] Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201.

smoke therefrom is intermittent, owing to periodical cessation of work, and variation in the direction of the wind. Its noise and smoke may be a nuisance to a dwelling, though no damage to such dwelling or herbage on the land results nor damage to the rental or saleable value of the property. And the fact that steam railroads operated near the dwelling may have been a source of discomfort to its owner is no defense in an action for a nuisance caused by the noise and smoke from a gas plant; nor is it any defense that the most approved appliances and methods for the manufacture of gas have been adopted; the adoption of such appliances does not justify the continuance of the manufacturer where it remains a nuisance.[74a] A plant for the manufacture of compressed gas is not a nuisance *per se;* and whether the smoke or noise from it constitute a nuisance depends on the evidence in each particular case. Noises resulting from its operation, to constitute a nuisance, must be unreasonable and of such a character as to be of actual physical discomfort to persons of ordinary sensibilities. If the nuisance consists in the emission of smoke, then the smoke to constitute a nuisance must be emitted in unreasonable manner in view of the locality and surroundings.[74b] Nor will the drilling of a gas or oil well be

[74a] Judson v. Los Angeles, etc., Gas Co., 157 Cal. 168; 106 Pac. Rep. 581; Sherman G. & El. Co. v. Belden, 103 Tex. 59; 123 S. W. Rep. 119, reversing (Tex. Civ. App.), 115 S. W. Rep. 897; Western Texas Compress Co. v. Williams (Tex. Civ. App.), 124 S. W. Rep. 493; Seligman v. Victor Talking Machine Co., 71 N. J. Eq. 697; 63 Atl. Rep. 1093.

[74b] McGill v. Pintsch Compressing Co., 140 Iowa 429; 118 N. W. Rep. 786.

In action for a private nuisance, resulting from the operation of a gas plant, evidence of the general decrease of the value of property in the city where it is situated is not admissible. Sherman G. & El. Co. v. Belden, 103 Tex. 59; 123 S. W. Rep. 119; reversing (Tex. Civ. App.), 115 S. W. Rep. 897.

Where a constitutional provision gave a gas company the privilege of using city streets for its pipes, it was held that a county had no power to prohibit the manufacture of gas, though it might regulate its manufacture; and where an ordinance made it a misdemeanor to erect or maintain gas works in a sparsely settled district, containing only fifteen dwellings in all, none of which were nearer than 300 yards to the gas plant in such district, it was held unreasonable and void. *In re* Smith, 143 Cal. 368; 77 Pac. Rep. 180.

A city ordinance forbade the keeping within the city in any place

enjoined, especially when it is doubtful if either gas or oil will be found.[75]

more than 200 gallons of kerosene in barrels, tanks or cans, or more than 100 gallons in all of gasoline, unless kept in a fireproof magazine, isolated and located at some place approved by the council. It was held that the establishment of non-isolated tanks within the city having a capacity of 11,000 gallons each constituted an abatable nuisance as to adjoining property owners; but aside from the ordinance the erection of tanks having that capacity near a railroad track and adjacent to the location of the other similar tanks owned by others engaged in the same business, was not a nuisance. Texas Co. v. Fisk (Tex. Civ. App.), 129 S. W. Rep. 188.

A city ordinance provided that: "Whenever in this ordinance a provision is made that frontage consents shall be obtained for the erection . . . of any building or structure in any block, the word 'block' so used shall not be held to mean a square, but shall be held to embrace only that part of a street bounding a square which lies between the two nearest intersecting streets, one on either side of the point at which such building or structure is to be erected . . . unless it shall be otherwise specifically provided." The ordinance further provided that it shall not be lawful to construct on any street in any block in which two-thirds of the buildings on both sides of the street are used chiefly for residence purposes any building for a gas reservoir without the written consent of a majority of the property owners according to frontage on both sides of the street, and that, in determining whether two-thirds of the buildings on both sides of the street are used chiefly for residence purposes, any building fronting upon another street and located upon a corner lot shall not be considered. It was held that the proposed construction of a gas reservoir which would be at its nearest point within four feet of Sixty-Fourth street and more than twenty-six feet from the nearest intersecting street is located on Sixty-Fourth street and frontage consents were essential only with respect to Sixty-Fourth street. People's Gaslight & Coke Co. v. City of Chicago, 145 Ill. App. 307.

[75] Windfall Mfg. Co. v. Patterson, 148 Ind. 414; 47 N. E. Rep. 2; 37 L. R. A. 381; 62 Am. St. Rep. 532.

If a gas company becomes a nuisance the nuisance may be abated. Walla Walla v. Walla Walla Water Co., 172 U. S. 1; 19 Sup. Ct. Rep. 77; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Butchers' Union Co. v. Crescent, etc., Co., 111 U. S. 746; 4 Sup. Ct. Rep. 652; Coates v. Mayor, 7 Cow. 585.

For a gas company to sink storage tanks on the extreme edge of its property and within a few feet of residence property, in which over 20,000 gallons were to be stored, was held to constitute a private nuisance, in view of the dangerous character of gasoline and the liability to explosion. Whittemore v. Baxter Laundry Co., 181 Mich. 564; 148 N. W. 437; 52 L. R. A. (N. S.) 930.

After its lawful location a gas company's plant may become a nuisance to the public because of the

§ 673. Former recovery a bar.

If the plaintiff has already recovered a judgment for damages because of the deterioration of his real estate by the maintenance of the gas works in its vicinity and for the pollution of the water thereon and rendering it unfit for use, such judgment is a bar to any further prosecution for the same cause, the continuance of the works being the sole basis of the second claim for damages.[76] But where an action was brought for damages incurred by injury to crops occasioned by the erection and maintenance of gas works, and the noxious vapors and smells created thereby; and the action was referred to an arbitrator to determine the injury, and "what should be done" between the parties; and nearly two years elapsed before he made his award with respect to the damages sustained up to the date of the award; and no evidence was given with respect to prospective damages; an entry was made in regard to the award the same as if it had been a verdict; and subsequently the gas company increased their works and altered their method of manufacture; it was held, on a bill filed by the plaintiff two months after the award, that he was entitled to a perpetual injunction to restrain the further manufacture of gas in a manner injurious to his crops, and that there had been no acquiescence on his part to deprive him of his right to an injunction. The award was treated as equivalent to the verdict of a jury.[77]

§ 674. Indictment for nuisance.

An indictment for the creation of a nuisance in the conduct of its works lies against a gas company, even though it has been authorized by a special act of the legislature to conduct its works in the town or city where located; and the fact that it has been so authorized is no defense.[78] But if the company, under

inflow of population near and around it. Raffan v. Canadian West Natural Gas Co., 8 W. W. R. (Ont.) 676.

[76] Decatur Gaslight and Coke Co. v. Howell, 92 Ill. 19.

[77] Imperial Gaslight Co. v. Broadbent, 7 H. L. Cas. 600; 29 L. J. Ch. 377; 5 Jur. (N. S.) 1319; 7 De G. McN. and G. 436; 9 Gas J. 751.

[78] Parry v. Croydon Gas Co., 15 C. B. 568; 10 Jur. (N. S.) 172; 9 L. T. (N. S.) 694; 12 W. R. 212; 11 C. B. (N. S.) 578; Rex. v. Medley, 6 C. and P. 292.

such authority, has erected its buildings in the best manner possible, and used the best known methods of making, storing and distributing gas, it will not be liable, although it may be liable to a private person injured by the operation of the works in the manner described.[79]

§ 675. Waste of natural gas or oil.

In Indiana a statute provides that it shall be unlawful for anyone having possession or control of a gas or oil well "to allow or permit the flow of gas or oil from" it "to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle for a longer period than two days next after gas or oil shall have been struck in such well; and thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles."[80] It was not only held that this statute was constitutional, but also that the State could maintain an action to restrain the waste of gas in violation of its provisions, where it was alleged that the penalties for the wasting of gas were wholly inadequate, and that the injuries occasioned by the wrongful and unlawful conduct of the defendant, if permitted to continue, would be irreparable. It was considered that permitting gas to escape in violation of the statute was a nuisance. In passing upon the case the court said:

"Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this State has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind. But appellee tries to excuse its conduct on the score that it cannot mine and utilize oil under and in its land without wasting the gas. But there is nothing in the record to bear out that

[79] People v. N. Y. Gaslight Co., 64 Barb. 55; 6 Lans. 467.

[80] Burns' Stat. 1914, Sec. 9062; Thornton's Rev. Stat. 1897, Sec. 7887.

claim. However, if there was, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the storehouse of nature, wherein is deposited an element that ministers more to the comfort, happiness, and wellbeing of society than any other of the bounties of the earth. Even if the appellee cannot draw oil from its wells without wasting gas, it is not denied that it may draw gas therefrom, and utilize it without wasting the oil. But, even if it cannot draw oil from such wells without wasting gas, and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the State, and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana, and, in effect, says: 'It is my property, to do as I please with, even to the destruction of one of the greatest interests the State has, and you people of Indiana help yourselves if you can. What are you going to do about it?' We had petroleum oil for more than a third of a century before its discovery in this State, imported from other States, and we could continue to do so if the production of oil should cease in this State. But we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless. We therefore conclude that the facts stated in the complaint make a case of a public nuisance which the appellant has a right to have abated by in-

junction, and that the complaint states facts sufficient to constitute a cause of action."[81]

[81] State v. Ohio Oil Co., 150 Ind. 21; 49 N. E. Rep. 809; 47 L. R. A. 627. As to the penalty of this statute, see McDonald v. Carlin, 163 Ind. 342; 71 N. E. Rep. 961; Bailey v. State, 163 Ind. 165; 71 N. E. Rep. 655. As to Kentucky statute, see Commonwealth v. Trent, 117 Ky. 34; 77 S. W. Rep. 390; 25 Ky. L. Rep. 1180; and Pennsylvania statute, see Steelsmith v. Aiken, 14 Pa. Super. Ct. Rep. 226, and Dawson v. Shaw, 28 Pa. Super. Ct. Rep. 563.

CHAPTER XXIX.

LEAKS AND EXPLOSIONS.

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§ 676. Duty of gas companies in general.

In speaking of the duty of a gas company supplying a city and its inhabitants with gas, the Supreme Court of Massachusetts has used the following language: "The defendants [a gas company], under their charter, were in the enjoyment of a great and peculiar privilege, that of supplying the means of light to all parts of the city. This devolved upon them a corresponding degree of responsibility in the conduct of their business and in the preservation of every part of their apparatus from defects by which the public might be subjected to great inconvenience, and individuals be exposed to imminent peril and danger in respect to property and their lives. They are therefore under the highest degree of obligation to be at all times in a state of the most ample preparation to meet, with all reasonable promptitude and despatch, whatever exigency might occur. It is manifestly impossible that they should have at their service, at every moment and at every point of exposure, an adequate force to overcome a sudden fracture of their pipes, or any other casual and unexpected obstacle in the conduct of their affairs in the shortest possible time. All that they are required to do is to afford ample opportunities to all parties interested to make communications to them, to institute and maintain an efficient system of oversight and superintendence, and to be prepared with a sufficient force ready to be put in action, and fully competent to supply and furnish a prompt remedy for

all such accidents, defects, and interruptions in their affairs, as from experience and character of their works there was reasonable ground to anticipate might occur."[1]

§ 677. Care required of gas companies.

In Massachusetts the following rule was laid down by the Supreme Court, relative to the care required of a gas company furnishing a city and its inhabitants with gas: "It is the duty of gas companies, which are invested, for their own profit and advantage, with the great and important privilege of supplying the community with light for private habitations, and for other

[1] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233; Citizens' Gas, etc., Co. v. Whipple, 32 Ind. App. 203; 69 N. E. Rep. 557; Hartman v. Citizens' Nat. Gas Co., 210 Pa. 19; 59 Atl. 315; People's Gaslight & Coke Co. v. Porter, 102 Ill. App. 461; Sipple v. Laclede Gaslight Co., 125 Mo. App. 81; 102 S. W. Rep. 608; Pulaski Gaslight Co. v. McClintock, 97 Ark. 576; 134 S. W. 1189, 1199.

Where water is used in a meter, the gas company must keep the meter so supplied with water that it will not leak. Hacker v. London Gaslight Co., 32 Gas J. 781.

Defendant was engaged in manufacturing calcium carbide, a product which generated a highly explosive gas when brought into contact with water, and its foreman directed a plumber in its employment to repair certain water pipes near an elevator pit, at the bottom of which was stored a quantity of carbide. When the plumber took apart the pipe to make the repairs, the water therein ran out and into the elevator pit, and came in contact with the carbide at the bottom, causing an explosion, by which plaintiff's intestate was killed. The water in the pipe could easily have been discovered and drained, but no effort was made to do so, and the plumber was not cautioned against permitting the water to run out on the floor. It was held, that defendant was chargeable with knowledge of the facts which caused the explosion, and the accident was one which it should have anticipated and used every precaution to prevent. Charron v. Union Carbide Co., 151 Mich. 687; 115 N. W. 718.

A gas company cannot contract against its liability for damages occasioned by an explosion brought about by its negligence. Bastian v. Keystone Gas Co., 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537; 4 Am. Neg. Rep. 529; Deckert v. Municipal, etc., Co., 9 N. Y. App. Div. 573; 41 N. Y. Supp. 692.

places devoted to public or private use, to exercise due care and diligence in keeping the gas constantly under their control and preventing it from escaping into a dwelling house or place of business, where the inmates or occupants are in such cases involuntarily subjected to its effects, whether they are positively injurious or merely disgusting and offensive. If its effect is noxious as well as disagreeable, the diligence required to take care of and control it should be still more active and unremitting."[2]

§ 678. Gas company must keep its gas constantly under control.

A gas company operating in the streets of a city or town is bound to constantly keep its gas under control, and prevent it escaping into dwelling houses and places of business; and if the gas does escape and cause damages, the company is usually liable.[3] And the fact that the company, in the erection and operation of its plant, took all reasonable and proper precaution, and used the best and most approved machinery and appliances, added all that a prudent person could do to prevent the escape of gas from its plant, of itself does not relieve the com-

[2] Emerson v. Lowell Gaslight Co., 3 Allen 410; Parry v. Smith, L. R. 4 C. P. 325; 33 Gas J. 899.

Every precaution suggested by experience and the known dangers must be taken. Koelsch v. Philadelphia Co., 152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653; Consolidated Gas Co. v. Connor, 114 Md. 140; 78 Atl. 725; Jennings v. Davis, 187 Fed. 703; Bradley v. Shreveport Gas Co., 142 La. —; 76 So. 230.

The fact that other causes contributed to the injury does not bar the action, though it may be shown to affect the damages. Sherman v. Fall River, etc., Co., 5 Allen 213.

[3] Armbruster v. Auburn Gaslight Co., 18 N. Y. App. Div. 447; 46 N. Y. Supp. 158; Bastian v. Keystone Gas Co., 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537; Chisholm v. Atlanta Gaslight Co., 57 Ga. 28; Triple, etc., Co. v. Wellman (Ky.), 70 S. W. Rep. 49; So. Oil, Langabough v. Anderson, 22 Ohio Cir. Ct. Rep. 178; 12 Ohio C. D. 341.

pany from responsibility, if an injury actually results because of the escaping gas.[4] Gas is regarded, and is, a dangerous substance; and he who brings it onto his or another's premises must safely keep it at his peril. In this respect it is not unlike the collection of a large body of water upon one's premises; the person so doing does so at his peril and must keep it safely confined. In an Ohio case where a stand-pipe filled with water fell, causing much damage, the court said: "This brings us to the consideration of the question of the liability of one who, for his own purposes, collects upon his premises a substance likely to injure others in case it escapes.

"The principle upon which liability rests in such case is quite unlike that which determines the liability of one who leaves unguarded, excavations upon his own lands, or one who negligently constructs a building so that it falls upon his own premises. In these latter cases no one can be injured unless he comes upon the premises. If he remains away, he is safe. In the former, the danger arises from the natural tendency of the things to escape from the premises where stored, together with the likelihood of its doing injury if it does escape therefrom. In England it seems to be settled by Fletcher vs. Rylands,*[4] inanimate substances or animate things from the escape of which injury is likely to follow, to prevent such escape. While this duty may not extend to trespassers, or those who, for their own purposes, without express or implied invitation from the proprietor, chose to come upon the premises, yet that case (Fletcher vs. Rylands, *supra*),should be regarded as extending this duty to all persons who may be rightfully on adjoining premises. Blackburn, J., in the course of an able opinion, and speaking for the whole court, used the following language: 'We think the true rule of law is that the person, who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable

[4] Belvidere Gaslight Co. v. Jackson, 81 Ill. App. 424.

But where a rubber gasket from a joint in the pipe blew out, it was held that the defendant gas company was not liable. Jennings v. Davis 187 Fed. 703.

*[4] L. R. 1 Exch.

for all the damage that is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to plaintiff's default; or, perhaps, that the escape was the consequence of a *vis major,* or the act of God. . . . The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief may accrue, and it seems but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this, we think, is established to be the law, whether the things so brought, be beasts, or water, or filth, or stenches.'

"This doctrine," resumes the Ohio court, "would seem to be in exact accord justice and sound reason; but in the case before us we are not required to apply it to its full extent, because the defendant in error, in her amended petition, expressly avers negligence in the construction of the stand-pipe, as well as knowledge that it had afterward cracked and become weakened, a negligent failure to make repairs, and that the accident which caused her injuries was the direct result of such negligence."

"Therefore, whether or not she could recover in the absence of negligence on the part of the water company in storing the water, does not concern us at this time, for, however that may be, certainly one who, like defendant in error, is rightfully on premises adjoining those upon which such substances are stored, and is injured by their escape, should, upon the plainest principles of natural justice, recover from the proprietor storing the

same, damages for such injury, where the escape was caused by negligence."

"While every person has exclusive dominion over his own property, and may subject it to such uses as may subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights."

"The maxim '*sic utere tuo ut alienum non laedas*' limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood." "The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced holding that negligence is essential to establish a cause of action for injuries of such a character." [5]

[5] Defiance Water Co. v. Olinger, 54 Ohio St. 532; 44 N. E. Rep. 238; 32 L. R. A. 736; 35 Ohio L. J. 323, 350.

The court cites St. Mary's Woolen Mfg. Co. v. Bradford Glycerine Co., 14 Ohio Cir. Ct. Rep. 522; Bohan v. Gaslight Co., 122 N. Y. 18; 9 L. R. A. 711; 34 Am. and Eng. Corp. Cas. 57; and Brady v. Detroit Street, etc., Co., 102 Mich. 277; 60 N. W. Rep. 687; 26 L. R. A. 175.

This is the doctrine of the case of Rylands v. Fletcher, L. R. 3, H. L. 330, which has been held in Pennsylvania not to be applicable to a gas company. Strawbridge v. Philadelphia, 13 Phila. 173; 13 Repr. 216; 36 Leg. Int. 276.

In Kentucky it was held that a natural gas company is not an insurer of the safety of its product, so as to be responsible for a failure to keep it confined. It is only liable for a failure to exercise ordinary care. Triple State, etc., Co. v. Wellman 114 Ky. 79; 70 S. W. Rep. 49.

Gas was installed in decedent's house prior to 1903, and was connected with a goose neck to a meter. A tenant occupied the premises from 1903 to 1907, during which no gas was used in the house. In 1905, the grade of the street and the defendant's mains were lowered, and a new service pipe was put in without request or notice to decedent, and the old service pipe was disconnected and left in the ground. The new service pipe was connected with the same riser that had previously been connected with the old service pipe, and was left practically in the same position, with nothing to indicate that it was not still connected with the old pipe. The old service pipe stuck out of the ground two or three inches, over the curb line, and the sidewalk, on being cut down to grade, left it exposed across the walk, forming an obstruction. Decedent returned from another state and occupied the house in 1907, without any knowledge that a new service pipe had been put

§ 679. Degree of care required of gas company.

The decisions are not uniform with respect to the degree of care required of a gas company to prevent leaks and explosions. In many cases it is said that the company must use due care to prevent an injury to person or property, no other qualifications of the degree of care being used.[6] And after notice of a leak it is said it must use "reasonable diligence" to discover and

in, or that the riser was not still connected with the old pipe. He endeavored to take up the old pipe to remove the obstruction across the walk, and in doing so unscrewed the riser, when he was overcome with gas and died before he could escape from under the house porch.

It was held that the gas company's negligence in cutting off the old service pipe from the main and leaving it exposed and apparently still connected with the riser, and installing a service with a new pipe and connecting it with the old riser, without the knowledge or consent of the deceased, or anything to put him on inquiry, was the proximate cause of the decedent's death. Pulaski Gaslight Co. v. McClintock, 97 Ark. 576; 134 S. W. 1189 and 1199.

A gas company whose capped service pipe extends into a house which is not being served with gas, is not absolutely bound to prevent the escape of gas into the house. The duty being merely to use ordinary care to prevent it. Louisville Gas Co. v. Guelat, 150 Ky. 583; 150 S. W. 656.

It is negligence for a gas company to open an outlet in a gas pipe to allow gas pressure to blow out the obstructions in the pipe and thereby liberate in a partly closed shed highly combustible or explosive gas when mixed with air, unless it is unavoidably necessary and is accompanied by every reasonable precaution for guarding against the danger thus created. Bradley v. Shreveport Gas Co., 142 La. —; 76 So. 230. In this case it was held that the plaintiff was not required to show how the gas ignited. *Ibid.*

[6] Pine Bluff, etc., Co. v. McCain, 62 Ark. 118; 34 S. W. Rep. 549; Louisville Gas Co. v. Gutenkuntz, 82 Ky. 432; Triple State, etc., Co. v. Wellman, 114 Ky. 79; 70 S. W. Rep. 49; 24 Ky. Law Rep. 851; Gould v. Winona Gas Co., 100 Minn. 258; 111 N. W. Rep. 254; 10 L. R. A. (N. S.) 889; Citizens' Gas, etc., Co. v. Whipple, 32 Ind. App. 203; 69 N. E. Rep. 557; Hartman v. Citizens' Nat. Gas Co., 210 Pa. 19; 59 Atl. Rep. 315; People's Gaslight & Coke Co. v. Porter, 120 Ill. App. 461; Shirey v. Consumers' Gas Co., 215 Pa. 399; 64 Atl. Rep. 541; Louisville Gas Company v. Guelat, 150 Ky. 583; 150 S. W. 656; Manning v. St. Paul Gaslight Co., 129 Minn. 55; 151 N. W. 423; Taylor v. St. Joseph Gas Co., 185 Mo. App. 537; 172 S. W. 624; Rock Oil Co. v. Drumbaugh, 59 Ind. App. 640; 108 N. E. 260; Bradley v. Shreveport Gas Co., 142 La. —; 76 So. 230.

stop it, which is an elastic phrase; and it may be remarked no one would expect it to use "unreasonable degree of diligence."[7] In a Pennsylvania case the degree of care required was stated as follows: "The definitions of negligence which have been attempted imply that a higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business, which involve little or no risk of injury to persons or property. While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by the experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business. It requires nothing unreasonable; it does not require that the company shall keep up a constant inspection all along its lines without reference to the existence or non-existence of probable cause for the occurrence of leaks or escape of gas."[8] But in an Indiana case,

[7] Consolidated Gas Co. v. Crocker, 82 Md. 113; 34 Atl. Rep. 423; 31 L. R. A. 785; Hunt v. Lowell Gaslight Co., 1 Allen 343; Blenkiron v. Great Central Gas, etc., Co., 2 F. and F. 437; 2 Gas J. 292, 776; L. T. (N. S.) 317; Consolidated Gas Co. v. Connor, 114 Md. 140; 78 Atl. 725.

[8] Koelsch v. Philadelphia Co., 152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653. "Something like this was said in Kiebele v. Philadelphia, 105 Pa. St. 41, and in Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233; and Smith v. Boston Gaslight Co., 129 Mass. 318; and this principle is recognized in many kindred cases." Shirey v. Consumers' Gas Co., 215 Pa. 399; 64 Atl. Rep. 541; Hartman v. Citizens' Nat. Gas Co.,

in speaking of the duty of a natural gas company, the court said: "Appellant was engaged in dealing in and furnishing to its patrons a dangerous, deadly explosive, and inflammable element. The character of the product it furnished required of it the highest degree of care and caution, and imposed upon it a continuing duty of oversight and inspection."[9] These several expressions may be all reconciled, probably, by the well known rule in negligence cases that due care in a particular instance depends upon the existing danger—the care required increasing with increase of the danger. Or, as it has been stated, in a particular application, a gas company is bound to exercise a reasonable degree of care commensurate with the dangerous and explosive nature of its commodity.[10] This is the rule laid down in many cases.[11] It must be borne in mind that

210 Pa. 19; 59 Atl. Rep. 315; Gould v. Winona Gas Co., 100 Minn. 258; 111 N. W. Rep. 254; 10 L. R. A. (N. S.) 889; (Care commensurate with the danger); Citizens' Gas, etc., Co. v. Whipple, 32 Ind. App. 203; 69 N. E. Rep. 557; People's Gaslight & Coke Co., 102 Ill. App. 461; Marshall Window Glass Co. v. Cameron, etc., Oil Co., 63 W. Va. 202; 59 S. E. Rep. 959; Hashman v. Wyandotte Gas Co., 83 Kan. 328; 111 Pac. 468; Merrill v. Los Angeles Gas & El. Co., 158 Cal. 499; 111 Pac. 534.

[9] Indiana, etc., Gas Co. v. Long, 27 Ind. App. 219; 59 N. E. Rep. 410; Alton Ry., etc., Co. v. Foulds, 81 Ill. App. 322; affirmed 190 Ill. 367; 60 N. E. Rep. 537 (electricity); Bastian v. Keystone Gas Co., 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537; Sipple v. Laclede Gaslight Co., 125 Mo. App. 81; 102 S. W. Rep. 608; Bellevue Gas & Oil Co. v. Carr (Okl.), 161 Pac. 203; Clark v. E. I. Du Pont de Nemours Powder Co., 94 Kan. 268; 146 Pac. 320 (solidified glycerine); Feely v. National Packing Co. (La.), 75 So. 837.

[10] This was said with reference to the duty of a gas company in keeping its meters in a condition free from menace of danger to the persons or property of others. Anderson v. Standard Gaslight Co., 17 N. Y. Misc. 625; 40 N. Y. Supp. 671; Starkey v. Portland Gas & Coke Co. (Ore.), 144 Pac. 1152; 145 Pac. 660; City Gas Co. v. Webb, 117 Va. 269; 84 S. E. 645; Dowler v. Citizens' Gas & Oil Co., 71 W. Va. 417; 76 S. E. 845.

[11] Butcher v. Providence Gas Co., 12 R. I. 149; 34 Am. Rep. 626; Rockford Gaslight, etc., Co. v. Ernst, 68 Ill. App. 300 (must exercise care in the use of gas in proportion to the danger); Belvi-

a gas company is a quasi-public corporation, in cities and towns dealing with the public, and having the right to lay its pipes in the public streets. Hence there devolves upon it a duty to use a greater degree of care than if it was merely a private corporation, especially if the latter is remote from contact with the public. It is handling a dangerous substance—probably more dangerous than gunpowder—often in the midst of heavily populated districts; and such a situation calls for a high degree of care. "Care and diligence," said the Supreme Court of Massachusetts, "should always vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstance under which they are to be exercised. But it must be equal to the occasion on which it is to be used, and is always to be judged of according to the subject matter, the force and danger of the material under the defendant's charge and the circumstances of the case."[12]

dere Gaslight and Fuel Co. v. Jackson, 81 Ill. App. 424; Chisholm v. Atlanta Gaslight Co., 57 Ga. 28; Armbruster v. Auburn, 18 N. Y. App. Div. 447; 46 N. Y. Supp. 158; Barrickman v. Marion Oil Co., 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92.

[12] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233; Holding v. Liverpool Gas Co., 3 C. B. 1; 10 Jur. 883; 15 L. J. C. P. 301; 5 N. Y. Leg. Obs. 77; Anthon N. P. 356, note; Koelsch v. Philadelphia Co., *supra;* Mississinewa Mining Co. v. Patton, 129 Ind. 472; 28 N. E. Rep. 1113; 28 Am. St. Rep. 203.

It is not error to charge a jury that a gas company "is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of its business, in order that any injury may not be done to others; that is to say, if the danger, delicacy or difficulty is extraordinarily great, extraordinary skill and diligence is required," in an action for the burning of a building by gas escaping from pipes. Citizens' Gas, etc., Co. v. Whipple, 32 Ind. App. 203; 69 N. E. Rep. 557.

Where decedent was killed by an inhalation of gas while endeavoring to take up certain old pipes, which he erroneously believed had been disconnected from the main, by reason of the defendant's alleged negligence in putting in new service pipes, without taking out the old ones, the defendant was held not to be entitled to a verdict, if the de-

§ 680. Night watchman.

It is the duty of a gas company to keep watch not only in the daytime over its plant and the supply of gas, but also at night; especially where the pressure of the gas in the mains fluctuates, as in the case of natural gas. "A person or corporation who furnishes natural gas to customers and negligently causes, suffers or permits the pressure to increase beyond the usual and accustomed pressure to the extent that it overheats stoves, etc., of its customers, and without the latter's fault, so that damage results to the customers, such act is a positive wrong, and is therefore actionable. In a case of this character it is not sufficient to relieve the gas company from liability for it to show that its regulators, etc., were in good repair and working order; but it must go further and show that it had maintained an efficient system of inspection; that it provided a watchman or competent servant to control the pressure, etc.[13] Especially is it necessary for this to be done during the night, for it has become a matter of common knowledge that during the night, while many fires are either turned out or down, that receive their supply of fuel from the same main, the pressure is increased."[14]

cedent disconnected a riser and inhaled the gas, unless he did so voluntarily. Having gone under the porch of the house to disconnect the riser, and, the court having found as a matter of law that death was instantaneous and without suffering, there could be no further claim that the decedent was negligent in remaining under the house and attempting to connect the gas.

Pulaski Gaslight Co. v. McClintock, 97 Ark. 576; 134 S. W. 1189 and 1199.

[13] Citing Koelsch v. Philadelphia Co., 152 Pa. St. 355; 25 Atl. Rep. 522; 34 Am. St. 653; 18 L. R. A. 759.

[14] Indiana, etc., Co. v. Long, 27 Ind. App. 219; 59 N. E. Rep. 410; Indiana, etc., Gas Co. v. New Hampshire, etc., Co., 23 Ind. App. 298; 53 N. E. Rep. 485; Citizens' Gas, etc., Co. v. Whipple, 32 Ind. App. 203; 69 N. E. Rep. 557.

The watchman's negligent failure to report leaks he has discovered is the neglect of the company. Diehle v. United Gas Imp. Co., 225 Pa. 494; 74 Atl. Rep. 349.

§ 681. Gas company's act or neglect must have caused the damage.

It is an elementary proposition that the act of the gas company, or its neglect to perform a duty, must cause the damages, to make it liable. The damages must be directly traceable to the act of the gas company; or they must be directly traceable to its failure to perform a duty, the word "duty" in this connection implying that the company is under an obligation to perform the thing, which, omitting to perform caused the injury. In an Indiana case is furnished an illustration of this statement. A complaint in an action against a natural gas company to recover damages to the plaintiff, caused by an overheated stove, contained the allegations that the plaintiff had control of all gas appliances within her home, except the mixer, that the defendant, over her protest, substituted a number seven for a number five mixer, but there was no allegation that the defendant was bound to furnish such a mixer as the consumer desired, or that the fire might not have occurred with either mixer; that a valve was placed in the pipe to regulate the flow of gas, but that the amount of the flow depended entirely upon the pressure, which was regulated by the company; that the "valve was used to turn off and put on the gas," and that "she had carefully adjusted the valve to suit the pressure before her absence." It was held that the complaint failed to show any negligence on the part of the defendant, and also failed to show that the plaintiff was free from fault. In passing on the case the court said: "In the case at bar the complaint fails to make a case within the above rule. Construing the pleading most strongly against the pleader we can but conclude that it fails to show any negligence on the appellee's part, and also fails to show appellant free from fault. It appears that appellant had control of all gas appliances within her home except the mixer. Complaint is made that appellee changed, over appellant's protest, a number five for a number seven mixer, but there is nothing to show that appellee was legally bound to furnish such mixer as the consumer wished. So far as we are informed by the complaint, the fire might have occurred with

either mixer. It is not shown where the right to determine the size of the mixer lay. Appellee may have had the right under franchise to require a certain mixer for such a house as appellant's; it may have had a perfect right to change the mixer as it did. It is not claimed the mixer put in was defective, or that any of the appliances were defective. It is not shown that the change was a negligent act, or that appellee did anything wrongful in making the change, or that after the change was made it negligently increased the pressure through such changed mixer. It is averred that the gas passes out of the pipe through mixer into an instrument called a burner, and in the pipe before the point where the gas passes through the mixer, ' is placed a valve which is opened and closed to regulate the flow of the gas, but the amount of the flow of gas depends upon the pressure entirely,' and that the pressure is regulated by the company. It is also averred that the ' valve is used to turn off and put on the gas.' Construing these averments together they mean that the flow of gas, whether the pressure was great or small, was controlled by this valve. And it seems appellant knew this and acted upon it, and that she also knew the pressure was not uniform, for she avers that ' she had carefully adjusted the valve to suit the pressure before her absence.' If she made a mistake and failed to turn the valve low enough, she cannot complain. It is clear from the pleading that she knew the manner of regulating the flow of gas, and made an attempt to regulate it." [15] Where a complaint alleged that the defendant was guilty of negligence in failing to turn off the supply of gas from a house after being directed to do so, in order that a defective pipe within the cellar might be located and fixed; and that the plaintiff, who was a plumber, while searching for the defect was injured by an explosion, it was held that it did not show that the injury was the proximate cause of the defendant's negligence, as the presumption is that there was an intervening responsible agency for which the defendant was

[15] Ibach v. Huntington, etc., Co., 23 Ind. App. 281; 55 N. E. Rep. 249.

not responsible.[16] So where it appeared that the gas came into the cellar through a break at the junction of the service pipe and the "riser" leading up into the house, and that the gas company's workmen were engaged in repairing the mains opposite the house, but there was no evidence to show that their work in any way affected the service pipe, or it did not connect them in any way with the condition of the pipe; it was held that no negligence was shown on the part of the company or its servants, and a compulsory non-suit was entered.[17] Where the gas had been cut off and the meter in an engine room removed and the service pipe left open; and it was charged that gas escaped, reached a lamp and exploded, causing a fire; and the only facts on which the plaintiff's theory was based were that the windows where the lamp stood were found in the alley alongside of the shop, although there was nothing to show that they had been blown out; that the lamp was lying on the floor unbroken, and after the fire a strong odor of gas was noticed near the service pipe; and no one saw the commencement of the fire, nor saw or heard an explosion, although persons were within ninety feet when the fire broke out; and the windows were the only evidence to show there had been an explosion; that the open furnace under the boilers between the gas pipe and the lamp had an open fire in it; and the plaintiff claimed that as gas rises, and the lamp was higher than the furnace, and the fire in the latter was low, the gas might reach the lamp first; it was held that the evidence of an explosion was not sufficient to submit the case to the jury, even though the contention of the plaintiff that gas would rise was true, for it would show that that part of the

[16] McGahan v. Indianapolis, etc., Gas Co., 140 Ind. 335; 37 N. E. Rep. 601; 29 L. R. A. 355. Without proof of negligence, the defendant cannot be held responsible for damages caused by an explosion of escaping gas. Strawbridge v. City of Philadelphia, 13 Phila. 173; 36 Leg. Int. 276; 13 Red. 216; Strawbridge v. City of Philadelphia, 2 Penn. 419; State v. Consolidated Gas Co., 85 Md. 637; 37 Atl. Rep. 263; Soulier v. Fall River Gas Works Co., 224 Mass. 53; 112 N. E. 627.

Proof of leakage of gas from gas mains makes a *prima facie* case of negligence. Fullerton v. Glen Falls, etc., Co., 157 App. Div. 191; 141 N. Y. Supp. 838. See also Bradley v. Shreveport Gas Co., 142 La. —; 76 So. 230.

[17] Krzywoszynski v. Consolidated Gas Co., 4 N. Y. App. Div. 161; 38 N. Y. Supp. 929.

room above the lamp was filled with gas, and its explosion would have produced more destruction than was caused by the alleged explosion.[18]

[18] Benson v. Allegheny Heating Co., 188 Pa. St. 614; 41 Atl. Rep. 729.

A gas company is not liable for injuries caused by an explosion where it is directly caused by the gas being introduced into the dwelling by another gas company's employee, who, mistaking the line for that of his own company, opened a by-pass, which was properly protected, without the defendant's knowledge, and which connected its low and high pressure line, producing an explosion, which would not have otherwise occurred. McKenna v. Bridge Water Co., 193 Pa. St. 633; 45 Atl. Rep. 52; 47 L. R. A. 790. See also Triple State, etc., Co. v. Wellman (Ky.), 70 S. W. Rep. 49; 24 Ky. L. Rep. 851.

Evidence of what the pressure of another company's gauge is, is not admissible. Barrickman v. Marion Oil Co., 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92.

Where defendant's watchman was notified that gas was escaping in the street where it had opened a trench, and he made no report, and nine hours afterward an explosion of gas occurred injuring a workman employed in the improvement, the defendant was held liable. Diehle v. United Gas Imp. Co., 225 Pa. 494; 74 Atl. Rep. 349.

The act of a servant of a gas company in leaving a small gas main open after receiving proper orders to close it, whereby gas escapes into a dwelling house and is inhaled, to the inmate's injury, was held to show gross negligence on the part of the company within the meaning of a statute making it liable for its servant's gross negligence. Hamma v. Haverhill Gaslight Co., 203 Mass. 572; 89 N. E. Rep. 1043. If a servant uncaps a pipe and leaves it, so that gas escapes into the house, and an explosion follows, the gas company is liable. Kenney v. South Shore G. & F. Co. (N. Y. App. Div. 859); 119 N. Y. Supp. 363; Heinz v. Consumers' Light, etc., Co., 81 Kan. 261; 105 Pac. Rep. 527; United Oil Co. v. Miller, 19 Colo. App. 46; 73 Pac. Rep. 627.

Evidence showing that defendant had a gas well 50 feet from plaintiff's premises, that gas accumulated in plaintiff's cellar, causing an explosion, and that gas was found in water wells within a radius of 200 feet of the gas well, was held insufficient to warrant a conclusion that the gas came from the defendant's well, or that he was negligent. Maxwell v. Coffeyville, etc., Co., 68 Kan. 821; 75 Pac. Rep. 1047.

Torrans v. Texarkana Gas & El. Co., 88 Ark. 510; 115 S. W. Rep. 389; Lodge v. United Gas Imp. Co., 209 Pa. 553; 58 Atl. Rep. 925; Richmond v. Gay, 103 Va. 320; 49 S. E. Rep. 482; Huntington L. & F. Co. v. Beaver, 37 Ind. App. 4; 73 N. E. Rep. 1002; Moore v. West Va. H. & L. Co., 65 W. Va. 552; 64 S. E. Rep. 721 (burden on plaintiff to show defendant's negligent act caused injury).

To render a gas company liable for an explosion of gas from a broken main, the injury must have been the natural and probable consequence of the negligent act, such

§ 682. Two or more defendants liable.

The circumstances may be such that two or more defendants may be liable for the damages occasioned by a leak or explosion. Such would be an instance where an individual negligently set fire to escaping gas, the company having had ample notice that it was escaping and having had sufficient time to stop the leak. Where two companies are jointly sued, but the several grounds of their liability are wholly separate and distinct, the admissions of one company touching the cause of the accident are not admissible in behalf of its co-defendant; and counsel for one

that an ordinarily prudent man might have anticipated. Mc-Williams v. Kentucky Heating Co., 166 Ky. 26; 179 S. W. 24; 166 Ky. 26; L. R. A. 1916 A, 1224.

That the owners of an oil and gas well caused the same to be shot with nitroglycerin late in the evening, instead of waiting until the following day, or failed to have the well capped and connected with a tank before shooting, or to leave some one in charge during the night, merely furnished the condition or gave rise to the occasion making injury possible, and their act cannot be held to have been the proximate cause of an explosion of escaping oil and gas, resulting in a loss of drilling tools and machinery, where the explosion occurred about 9 o'clock in the evening, when no one was present, and there is nothing to show how the escaping oil and gas came into contact with fire, or what the immediate cause of the explosion was. (Kan.) Comes v. Debney, 102 Pac. 488.

The fact that on two different occasions just before the explosion gas came through the ground, caught fire and burned above the gas company's pipes close to where the explosion occurred, together with the fact that the pipes had been in the ground for a considerable time, and had rusted and scaled, justifies a finding that the gas which exploded came from the gas company's pipes. Hashman v. Wyandotte Gas Co., 83 Kan. 328; 111 Pac. 468.

"What was the proximate cause of the explosion" covers other interrogatives whether the defendant's employees notified the proprietor to put out all lights and fires, whether they were put out, whether an open fire was burning at the time of the explosion, if so, whether it proximately caused the explosion, and if the explosion was not so caused, what was the proximate cause. This may be refused. Merrill v. Los Angeles Gas & El. Co., 158 Cal. 499; 111 Pac. 534.

In an action against a gas light company for injuries caused by a fire, started by escaping gas, the gist of the action is the damage caused by the fire, and it is wholly immaterial whether the origin of the fire was accompanied by a violent explosion or not.

Haas v. St. Paul Gaslight Co., 113 Minn. 379; 129 N. W. 759.

company cannot comment in argument or admissions made by the employees of the other defendant touching its responsibility for the accident, unless it has been shown that such employees were authorized to make such admissions. In such an instance, the one defendant is not entitled to the benefit of an instruction, given with plaintiff's consent, which is unduly favorable to its co-defendant, the rulings as to the one defendant being correct in themselves; and that admission of a servant of one of the defendants, made after verdict rendered at the close of the plaintiff's evidence in favor of his employer, touching the cause of the accident, is not admissible in favor of the co-defendant company, since the defendant making the admissions is no longer a party to the controversy.[19] In the case just cited it was held that one gas company was liable, even though only a part of the gas that exploded was its own. So if one carelessly and negligently applies a light to escaping gas he will be liable equally with the gas company that negligently permitted it to escape.[20] Where gas wells were drilled by a subcontractor, the pipes being furnished by the contractor and put together by the subcontractor; and after the subcontractor had ceased to use the pipes and gas for drilling purposes, the agents of the contractor took up the north and south line, which connected with the east and west line, leaving one joint connected with the T, after which the accident happened, the pipe line then being solely the property of the contractor; the latter was held liable because he had assumed the subcontractor's former charge to care for the line, which, after the accident, was used as a part of the permanent line. And where, before the accident, gas was delivered to the company by the contractor, partly through the pipe line in question, the company, as well as the

[19] Koplan v. Boston Gaslight Co., 177 Mass. 15; 58 N. E. Rep. 183; Schermerhorn v. Metropolitan Gaslight Co., 5 Daly 144; Burrows v. March Gas and Coke Co., L. R. 5 Exch. 67; 22 L. T. (N. S.) 24.

[20] Pine Bluff, etc., Co. v. McCain, 62 Ark. 118; 34 S. W. Rep. 549; see Flint v. Gloucester Gaslight Co., 3 Allen 343; Merrill v. Los Angeles Gas & El. Co., 158 Cal. 499; 111 Pac. 534.

contractor, was held liable, notwithstanding the fact that he had not, at the time of the accident, fully completed his contract, nor formally turned over the plant to the company which was in actual use, for the escape of gas which flowed through the pipe in question.[21] Where a contractor laying gas mains in a street joined them imperfectly, and the gas company turned on the gas before the works had been turned over to it, to test the pipes, and the gas escaped at the imperfect joints, injuring a workman; it was held that both the gas company and the contractor were jointly liable—the contractor, because he had done imperfect work; and the gas company, because it was its duty to see that the pipes were in a proper condition before turning gas into them.[22] A somewhat similar decision was made in case of escaping oil catching fire. In this instance an oil pipe was connected with an oil car. The oil escaping from the pipe caught fire, and in order to save the car by pushing it along from the track it became necessary to disconnect it from the pipe. A servant went upon the car by direction of another servant to turn the valve in it in order to cut off the flow of the oil into the pipe, and upon being advised and assured that the oil had been cut off, the injured servant disconnected the pipe from the car, whereupon the oil, by reason of the fact that it had not been cut off, poured over him, igniting and burning him severely. There were no stop-cocks in the pipe, so the oil could be cut off in case of danger, having been removed without notice to the servant sustaining the injuries. The court considered that it took the combined negligence of the master and

[21] Lebanon Light, etc., Co. v. Leap, 139 Ind. 443; 39 N. E. Rep. 57; 29 L. R. A. 342.

A mining company cannot escape by simply placing the management of its mining in charge of a person under a written contract, in which such person is called a "lessee." Consolidated Coal Co. v. Seninger, 79 Ill. App. 456; affirmed 179 Ill. 370; 53 N. E. Rep. 733.

[22] Chicago Economic Fuel Co. v. Myers, 168 Ill. 139; 48 N. E. Rep. 66; affirming 64 Ill. App. 270; 1 Chic. L. J. Wkly. 276.

the servant who was directed to cut off the flow of the oil to produce the injury, and that the master was liable.[23]

§ 683. Statute permitting recovery although there is no negligence.

A statute may be so drawn as to render a gas company liable for damages occasioned by an explosion, although there is no negligence on the part of the defendant. Thus in Ohio a statute with reference to a natural gas company provided that it "shall be liable for any damages that may result from the transportation of" natural gas. It was held that a natural gas company transporting natural gas was liable for an explosion, under this statute, although not guilty of any negligence causing the explosion, the court saying: "Upon principles of universal application, the company would be held liable for any damages that might result from its negligence in transporting natural

[23] Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285; 18 L. R. A. 215, affirming 41 Ill. App. 34.

The action may be brought against the person operating a plant, although another person built it, where the action is based on a defective construction of such plant. Hyde Park, etc., Co. v. Porter, 167 Ill. 276; 47 N. E. Rep. 206; affirming 64 Ill. App. 152.

Where a gas company measured gas furnished a cement company by meters so situated that when a "prover" was applied the gas escaped into the house of the latter company, and an employee of the cement company, having been sent for by its representative while a test was being made, lit a match near the door, causing an explosion, which injured an employee of of the gas company, held that the two companies were jointly liable. Leonard v. United Kansas Portland Cement Co., 139 P. 478; 91 Kan. 735.

The agent of a landlord employed a contractor to fumigate the landlord's tenements, occupied by several tenants, to kill vermin. The gas escaped into the basement and there killed the plaintiff's decedent. It was held that the landlord, the agent and the contractor were all liable, because a dangerous agency was employed. Skubiniuk v. Hartman, 24 Manitoba L. R. 836; 29 Wk. L. R. 765; 7 W. W. R. 392.

See where seller was held liable when the negligence of a garage proprietor and the seller's agent delivering gasoline concurred to cause the injury occasioned by an explosion. Lehy v. Standard Oil Co., 220 Mass. 90; 107 N. E. 458.

gas through the streets of a city. Therefore, to construe the statute as the plaintiff in error contends would deny it any operation or effect whatever. We think that when the subtle and dangerous properties of this fluid are considered, together with the long existing, and perhaps still unsettled, controversy that has claimed the attention of courts and textwriters, both in England and in this country, respecting the extent of the liability of those who deal in dangerous substances, for damages caused by them, and the absence of the word 'negligent,' in the Act declaring the liability of the plaintiff in error has great significance, and can only be reconciled with a legislative purpose to impose upon the company the duty of absolutely controlling this substance when it should introduce it into places where, if it escaped control, it would menace the lives and property of others, who had no control over it, and were without fault themselves contributing to injury."[24]

§ 684. Explosion occasioned by a violation of a statute.

A gas company may be liable for an injury occasioned by a violation of a statute prescribing regulations to be observed by it. Such was held to be the case where a company failed to test its pipes to a pressure of four hundred pounds to the square inch, as a statute required, and which forbade it to use a pressure of over three hundred pounds in conveying gas. The gas escaped because the pipes did not come up to the test prescribed.[25] And where the injury was occasioned by gas escaping from a pipe laid by the company on the surface of the highway, the company was held liable, although the particular injury could not have been foreseen.[26] And where a gas com-

[24] Ohio Gas Fuel Co. v. Andrews, 50 Ohio St. 695; 35 N. E. Rep. 1059; 29 L. R. A. 337. See Belvidere Gaslight Co. v. Jackson, 81 Ill. App. 424.

[25] Alexandria Mining, etc., Co. v. Irish, 16 Ind. App. 534; 44 N. E. Rep. 680.

[26] Indiana Natural, etc., Co. v. McMath, 26 Ind. App. 154; 57 N. E. Rep. 593; 59 N. E. Rep. 287; Lebanon, etc., Co. v. Leap, 139 Ind. 443; 39 N. E. Rep. 57; 29 L. R. A. 342.

pany unlawfully laid its pipe line in a highway, from which gas escaped and entered a defective water pipe of the plaintiff and polluted the water in his well, the company was held liable, and it could not escape liability by showing the defect in the water pipe. "Where a company," said the court, "chooses for its profit to bring a gas pipe upon the land, they must keep it there at its own peril." It is no answer to say, "Your pipe is bad, and the gas for that reason got into it."[27]

§ 685. Laying gas main in navigable river.

It is an illegal act to lay a gas main on the bottom of a navigable river, without sinking it beneath the soil of the bottom; and the company will be liable for all the consequences of its act in so illegally laying its pipe. Thus, where a gas company had so laid its pipe on the bottom of a river, and a boat ran against it, breaking it, whereby gas escaped and, igniting from the furnace of the boat, set the boat on fire, it was held that the gas company was liable for its destruction.[28] But where the trailing anchor of a vessel caught and injured a gas pipe laid upon the bed of a navigable river, it was held that if the captain of the vessel, upon striking the pipe could, with proper care and reasonable precaution, have then prevented the injury, the owners of the vessel would be liable for all injury which could thus have been prevented.[29]

[27] Batcheller v. Tunbridge Wells Gas Co., 84 L. T. 765; 65 J. P. 680. A tenant carrying on a livery stable without taking out a license required by an ordinance or a statute, cannot recover damages occasioned by the escape of gas, even though he might sustain an action for a nuisance to real estate. Sherman v. Fall River Iron Works Co., 5 Allen 213.

[28] Omslaer v. Philadelphia Co., 31 Fed. Rep. 354; 18 Pittsb. L. J. (N. S.) 4.

[29] Milwaukee Gaslight Co. v. Schooner Gamecock, 23 Wis. 144. This is manifestly correct, for no man can excuse his own negligence by the negligent or illegal act of another.

§ 686. Overwhelming disaster.

Where an overwhelming disaster falls upon a gas company's works, its efforts to prevent injuries to the public must be measured by the extent of the disaster. An illustration is afforded by the great fire in the city of Boston, November 9, 1872. A gas company's mains were broken, by the falling buildings, causing many leaks; the gas escaped throughout the burnt district, causing frequent explosions; and it escaped into cesspools and sewers in dangerous quantities. Notwithstanding these facts, the gas company on the subsequent day and night continued to manufacture gas in large quantities; and on the morning of that day the company was notified by a porter of a building that gas was escaping, and especially from the next adjoining building. The company had many valve boxes in the vicinity which were not closed, but there was no evidence that the fire, which burnt the building, for which the suit was brought and of which its porter had given notice of the leak, was caused by the leak of which the company was notified in the morning, or that by shutting the valves in the vicinity the escape of gas would have been stopped, or that it was practically possible to get at the valves for that purpose. It was held that there was no evidence of negligence, and on the evidence the jury was not warranted in finding for the plaintiff. The court did not consider it was the duty of the gas company to shut off the gas from the entire city, for that would probably have brought a train of disasters to the inhabitants and caused great inconvenience, by depriving the city of light and furnishing an opportunity for thieves and thugs. While the danger was great, requiring of the company great vigilance and great efforts to prevent injuries to persons and property, yet the burden devolved upon the plaintiff to show that it had not done all it could do and that it could have prevented the explosion and consequent fire. In this instance, it was not sufficient to show an escape of gas, an explosion and a resultant damage, for negligence could not be inferred from proof of these facts alone. Something more was required.[30]

[30] Hutchinson v. Boston Gaslight Co., 122 Mass. 219. See Koelsch v. Philadelphia Co., 152 Pa. St. 355; 25 Atl. Rep. 522; 34 Am. St. Rep. 653; 18 L. R. A. 759; Consolidated Gas Co. v. Crocker, 82 Md. 113; 33

§ 687. Burden of proof.

The plaintiff necessarily must sustain the allegations of his complaint or declaration; and this, of course, casts upon him the burden to prove that the defendant was guilty of the acts of negligence charged therein. In this respect, cases of injuries or damages inflicted by gas leaks or explosions do not differ from other cases of negligence. Facts must be alleged and shown affirmatively by the plaintiff that the defendant gas company by its own act or by its omission has violated some duty incumbent upon it which has caused the injury of which complaint is made.[31] If the charge be that the defendant gas company failed to discharge its duty in keeping its mains in a sound and safe condition for transmitting gas, the burden rests upon the plaintiff to show that fact in order to recover.[32] Where the owner of a house dug a tunnel from his cellar, under the street pavement, to a sewer, and an employee of the city searching for a leak in front of the house, not knowing that there was a tunnel there, lighted a paper, and moved it along the surface of the sidewalk, that being the usual method of discovering leaks, and ignited a jet of escaping gas, which he extinguished by covering it with dirt; and five minutes after an explosion occurred in the cellar, it

Atl. Rep. 423; State v. Consolidated Gas Co., 85 Md. 637; 37 Atl. Rep. 263.

[31] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233; Smith v. Boston Gaslight Co., 129 Mass. 318; Washington Gaslight Co. v. Eckloff, 22 Wash. L. Rep. 656; McGahan v. Indianapolis, etc., Gas Co., 140 Ind. 335; 37 N. E. Rep. 601; 29 L. R. A. 355; 49 Am. St. Rep. 199; Hutchinson v. Boston Gaslight Co., 122 Mass. 219; Strawbridge v. Philadelphia, 13 Phila. 173; 36 Leg. Int. 276; 2 Penny. 419; 13 Rep. 216.

In an action against a natural gas company for the alleged destruction of defendant's house by fire, the burden is on plaintiff to show the fact on which the liability rests, and the burden to disprove such fact does no shift to the shoulders of the defendant until plaintiff's evidence shows a state of facts sufficient to establish a rational belief of the existence of such fact. Moore v. West Virginia Heat & Light Co., 65 W. Va. 552; 64 S. E. 721; Topolski v. Chicago, etc., Gas Co., 150 Ill. App. 126.

[32] Holly v. Boston Gaslight Co., *supra;* Siebrecht v. East River Gas Co., 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; Heh v. Consolidated Gas Co., 201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819.

was held that the city was not liable.[33] And where the evidence showed that an employee of a gas company went into the cellar with a candle to fix the pipes; that soon after gas began to escape in large quantities, and some workmen went into the cellar to rescue the employee, who had become unconscious; that as they were about to pick him up "a big flash of fire came around us, and scattered all over the floor," as one of the witnesses testified; and there was no evidence that the employee had lighted the candle, or had any other light with him; nor any evidence as to the cause of the explosion, it was held that no negligence on the part of the gas company was shown.[34]

§ 688. Presumption of negligence does not arise from proof of explosion.

What will be sufficient proof to make a *prima facie* case of negligence must depend on the particulars of each individual case. Courts judicially know that both illuminating and natural gas is highly explosive and combustible, and that it will explode when ignited by fire.[35] The courts will also take judi-

[33] Littman v. New York City, 36 N. C. App. Div. 189; 55 N. Y. Supp. 383; affirmed 159 N. Y. 559; 54 N. E. Rep. 1093.

[34] Schaum v. Equitable Gaslight Co., 15 N. Y. App. Div. 74; 44 N. Y. Supp. 284.

The plaintiff is not bound to show by what means the gas was ignited. Luengene v. Consumers, etc., Co., 86 Kan. 866; 122 Pac. 1032.

The onus rests on the plaintiff to show the cause of the injury and showing a mere conjecture is not sufficient. Where the gas leaked causing the explosion was not shown to be attributable to any defect in the construction of the laying of pipes, nor to insufficiency in the system of operation or inspection, and it was proved that there were probable causes unconnected with the possibility of negligence on the company's part, it was held that the plaintiff must establish that the escape of gas was due to the company's negligence, or fail in his action. Kerabelas v. Canadian, etc., Co., 16 D. L. R. (Ont.) 791; 28 Wk. L. R. (Ont.) 669.

[35] Alexander Mining, etc., Co. v. Irish, 16 Ind. App. 534; 44 N. E. Rep. 680; Brown v. Spillman, 155 U. S. 665; 15 Sup. Ct. Rep. 245; Fuchs v. St. Louis, 133 Mo. 168; 31 S. W. Rep. 115; 34 S. W. Rep. 508; 34 L. R. A. 118 (gases from petroleum).

But it will not take judicial notice that dry, fine coal dust is a dangerous and explosive element. Cherokee, etc., Co. v. Wilson, 47 Kan. 460; 28 Pac. Rep. 178.

cial notice that gas will not explode unless caused by some outside agency, as the introduction of fire or an electric spark; and also that it can be confined in pipes and safely conducted through the streets to the consumer. In addition to this is the rule that gas companies distributing gas must exercise vigilance to prevent injury to persons while remaining on the premises where manufactured, or while being carried through its own pipes to its consumers,[36] and the vigilance required is of a much higher degree where the pipes are laid in the streets of a densely populated city than where laid in the country.[37] But notwithstanding these facts, proof of the explosion and the resulting injury will not establish the liability of the gas company. It must not be forgotten that the cause of action is founded upon the negligence of the defendant, and that negligence must be shown before there can be a recovery. Thus, where it was shown that an explosion occurred in an oil refinery, followed by a fire; that the burning oil ran down a pipe used by the oil company to pump oil into the refinery from vessels lying at the wharf, and entered a lighter filled with oil, which exploded, communicating the fire to the plaintiff's vessel about twenty feet distant, the fire being occasioned by the explosion of a boiler, called an "agitator," used in the refinery; but there was no evidence to show that it was not a proper boiler, such as was generally in use, or that the explosion was occasioned by an improper use of it, or that it was defective. On this evidence the court held that the defendant oil company was not liable, as it was only liable for its negligence, the mere fact of an explosion not raising a presumption of negligence. The court was careful to call attention to the fact that there was no contractual relation between the plaintiff and defendant — as there is, for instance, between a passenger and the railway company carrying him — and quoted an established work on negligence, where it is said: "It is believed that it is never true, except in contractual relations, that the proof of the mere fact that the acci-

[36] Tiehr v. Consolidated Gas Co., 51 N. Y. App. Div. 446; 65 N. Y. Supp. 10.

[37] Mississienawa Mining Co. v. Patton, 129 Ind. 472; 28 N. E. Rep. 1113; 28 Am. St. Rep. 203.

dent happened to the plaintiff, without more, will amount to *prima facie* proof of negligence on the part of the defendant." [38]

"We are of the opinion that the evidence presented by the plaintiffs failed to establish a cause of action against the defendant, and consequently that the trial court erred in denying the motion to dismiss the complaint made after plaintiffs had rested their case. The fact that the injury sustained by the plaintiffs may have been a direct result of the fire which originated upon the premises of the defendant does not of itself render it liable to respond in damages therefor. The defendant was not maintaining a nuisance. Its business was lawful, and, in its conduct, the law does not impose the obligation of saving harmless others from the consequences resulting from the occurrence of inevitable accident, but rather burdens it simply with the duty of using reasonable care and caution to save others from injury. If it omitted that duty, and failed to observe that ordinary care which was incumbent upon it, then, because of such neglect, it became legally chargeable with the damages directly resulting therefrom, but not otherwise. As the existence of negligence is an affirmative fact to be established by him who alleges it as a foundation of his right of recovery, it was incumbent upon the plaintiffs to point out, by evidence, the defendant's fault, for the presumption is, until the contrary appears, that every man has performed his duty. This rule has been frequently applied in cases where a fire has spread over and upon the lands of an adjoining owner to his damage. It has likewise been enforced against persons seeking to recover for damages sustained by fires originating from locomotives in operation upon railroads. But the plaintiffs insist that, while negligence cannot be inferred from the fact that the fire originated upon the premises of the defendant, it may be presumed from the proof of an explosion. It is difficult to discover a reason for holding that proof of the occurrence of a destructive fire in defendant's premises does not raise a presumption of negligence, while proof of the mere fact of an explosion does. It has been said that there is a general disposition among men

[38] 2 Thomp. Neg. Sec. 1227.

to preserve their property, and escape liability, and that ordinarily these motives will secure that degree of care and caution which the safety of the public demands, and hence the presumption of duty performed, which in cases of fire will protect him until the facts be proven from which negligence can be inferred. For precisely the same reason he is entitled to the benefit of such presumption in the case of an explosion, where no contractual relation exists; and the plaintiffs must go one step further, and prove the facts from which it can be legitimately inferred that either in construction, repair, or operation, he omitted that reasonable care and caution which he should have observed." [39]

[39] Cosulich v. Standard Oil Co., 122 N. Y. 118; 25 N. E. Rep. 259, reversing 55 N. Y. Super. Ct. Rep. 384. To support its conclusion the court cited Walker v. Chicago, etc., R. R. Co., 71 Ia. 658; 33 N. W. Rep. 224 (an explosion of dynamite); Huff v. Austin, 46 Ohio St. 386; 21 N. E. Rep. 864 (an explosion of a steam boiler); Young v. Bransford, 12 Lea. 232 (an explosion of a steam boiler); and refused to follow Rose v. Stephens, etc., Transportation Co., 11 Fed. Rep. 438; 20 Blatchf. 411. Followed in Reiss v. Steam Co., 128 N. Y. 103; 28 N. E. Rep. 24; Loeber v. Roberts, 17 N. Y. Supp. 378; Babcock v. Fitchburg R. R. Co., 140 N. Y. 308; 35 N. E. Rep. 596. See Losee v. Buchanan, 51 N. Y. 476 (boiler exploding); Morris v. Southworth, 154 Ill. 118; 39 N. E. Rep. 1099; Marshall v. Welwood, 38 N. J. L. 339; Washington Gaslight Co. v. Eckloff, 4 App. D. C. 174 (error to charge the jury that an unusual explosion on the premises was *prima facie* evidence of negligence); Lee v. Vacuum Oil Co., 54 Hun 156; 7 N. Y. Sup. 426.

The mere fact that a building was set on fire from gas is not sufficient to justify the inference that an increased pressure of gas caused the fire. Barrickman v. Marion Oil Co., 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92.

Mere ownership of gas in the pipes does not, of itself, render the owner liable for injuries caused by escaping gas, if the owner is in no manner guilty of negligence. People's Gaslight Co. v. Amphlett, 93 Ill. App. 194; Hammerschmidt v. Municipal Gas Co., 114 N. Y. App. 290; 99 N. Y. Supp. 890.

The explosion of a hot water radiator in a room in a railroad hotel does not raise a presumption of negligence on the part of the lessor, who had charge of the apparatus, toward a waiting passenger. Kirby v. Delaware, etc., R. R. Co., 20 N. Y. App. Div. 473; 46 N. Y. Supp. 777.

Mere proof of a leakage does not show the gas company was guilty of negligence. Hammerschmidt v. Municipal Gas Co., 114 N. Y. App. 290; 99 N. Y. Supp. 890.

Prima facie proof of negligence is made by showing the break or leak in the main and the consequent escape of gas, operating proximately to cause the loss. Sipple v. Laclede

§ 689. Presumption of negligence arising from proof of explosion.

Not in all jurisdictions does the rule prevail that has been announced in New York. The United States Court for the Southern District of that State refused to follow that rule, and adopted the rule that an explosion of oil in a building was *prima facie* evidence of negligence on the part of the defendant. "In the Court of Appeals of this State," said District Judge Brown, "it was held that an explosion in a building, unaccompanied by any explanation by the owner, or by any evidence of care on his part, furnishes no presumption of negligence;[40] and this was reaffirmed in Reiss v. Steam Company.[41] The opposite conclusion, held by Judge Wallace,[42] seems to me to be more sensible and just, and more in accordance with legal principles and analogies. The same ruling was made on appeal in the Circuit Court.[43] This ruling is based upon the principle (of wide application in the law of torts), that injuries which do not ordinarily happen when reasonable and proper care is taken to avoid them, afford a presumption of negligence, and place upon the defendant the burden of proof that ordinary and reasonable care was taken to avoid the accident; and also upon the principle of evidence, that he who has peculiarly within his

Gaslight Co., 125 Mo. App. 81; 102 S. W. Rep. 608; Fullerton v. Glenn Falls, etc., Co., 157 App. Div. 191; 141 N. Y. Supp. 838.

A jury may find negligence from the breaking of a gas main and the consequent escape of gas; but it is for the jurors to say whether they will do so, and, if there are other circumstances bearing on the question, they must weigh them all. Instructions that evidence "is sufficient to show," or "has a tendency to show," or is "enough to show," or "is *prima facie* evidence of," are not to be understood as meaning that there is a presumption of fact, but that the jury are at liberty to draw the inference from them. Carmody v. Boston Gaslight Co., 162 Mass. 539; 39 N. E. Rep. 184; Smith v. Boston Gaslight Co., 129 Mass. 318. (See this case noticed in section 687); Hutchinson v. Boston Gaslight Co., 122 Mass. 219 (See this case noted in section 609); Tiehr v. Consolidated Gas Co., 51 N. Y. App. Div. 446; 65 N. Y. Supp. 10.

[40] Citing Cozulich v. Standard Oil Co., 122 N. Y. 118; 25 N. E. Rep. 259.

[41] 128 N. Y. 103; 28 N. E. Rep. 24.

[42] Citing Rose v. Stephens, etc., Transportation Co., 11 Fed. Rep. 438; 20 Blatchf. 411.

[43] Citing The Sydney, 27 Fed. Rep. 119, 123.

power the means of producing evidence of reasonable care, shall be required to produce it." The opinion concludes, however: "The cause of the accident is, in fact, unexplained. Either an accidental fire, or some violation of the rules by workmen in smoking, or carrying a light, seem the only imaginable causes. . . . The evidence offered by the defendants shows a business not specially dangerous when prosecuted with reasonable care; that there were suitable regulations, arrangements, and reasonable care exercised; and that there was no neglect by the defendants to enforce such regulations. I think this sufficiently rebuts the *prima facie* presumption of negligence; and on this ground the libel should be dismissed, but without costs." [44]

§ 690. Stop-cock on street line.

Unless some statute (or perhaps a municipal ordinance) requires it, a gas company is not required to place a stop-cock at the street line, or outside the building supplied, so it can shut off the gas without entering the premises when necessary; and if the stop-cock is placed within the building supplied, the company is not required to enter and cut off the supply when notified by the consumer to discontinue the gas. In such an instance it is the duty of the owner of the building, or the tenant if in possession, to cut off the supply by turning the stop-cock.[45]

[44] Warn v. Davis Oil Co., 61 Fed. Rep. 631; Judson v. Giant Powder Co., 107 Cal. 549; 40 Pac. Rep. 1020; 29 L. R. A. 718; Dunlap Steamboat v. Reliance, 2 Fed. Rep. 249; Grimsley v. Hawkins, 46 Fed. Rep. 400 (boiler explosion).

In Belvidere Gaslight and Fuel Co. v. Jackson, 81 Ill. App. 424, it was held that the fact of the gas company using all reasonable and proper precautions in the erection and operation of its plant, using the most and best machinery and appliances, and did all a prudent person could do to prevent gas escaping, did not, of itself, in case actual damage resulted to others, relieve the company from liability. See also Rockford Gaslight, etc., Co. v. Ernst, 68 Ill. App. 300. But in another case from this same State it was held that if a gas company furnished reasonably good and sufficient material, suitable for the purpose for which it was intended and used, and put in place their conducting pipes in a good and workmanlike manner, it had fulfilled its duty and was not guilty of negligence. People's Gaslight & Coke Co., 102 Ill. App. 461.

[45] Holden v. Liverpool Gas Co., 3 C. B. 1; 15 L. J. C. P. 301; 10 Jur. 883.

Where the stop-cock in a supply pipe outside of a mill supplied with gas had been covered up by a third person and could not be used to turn off the gas during a fire in the mill, it was held that the owner of the building could not recover from the person who had covered it up where the mill took fire from an independent cause, and the owner had allowed the stop-cock to remain covered more than a year; for the inability to use the stop-cock was not the proximate cause of the injury, although the damages may have been increased by the escaping gas increasing the flames.[46]

§ 691. Intervening agency.

A gas company is bound to know the consequences that will probably follow its act of negligence; as, for instance, the use of defective pipes and the turning of gas into them, especially at a high pressure. In an instance of use of such pipes and the maintenance of a high pressure, and gas escaped and an explosion followed, it was said that it was not necessary to charge in the complaint that the gas company had special knowledge or notice of the happening of such consequences flowing from its original negligence, in the order in which it occurred. "No principle is better settled," said the court, "than the one that every person who is *sui juris* is presumed to know and in duty bound to anticipate the natural and usual consequences flowing from his unlawful acts or omissions. The only serious trouble that sometimes arises in the application of this principle is in determining whether or not a given result may be said to be such

[46] Cochran v. Philadelphia, etc., Co., 184 Pa. St. 565; 39 Atl. Rep. 296.

Where it is alleged a leak occurred at a certain place, evidence as to whether a stop-cock on the top of an upright pipe is a dangerous method of shutting off the gas must be rejected. State v. Consolidated Gas Co., 85 Md. 637; 37 Atl. Rep. 263.

If a gas company imperfectly cut off the gas when its use is discontinued, or if it undertake to close the aperture in the service pipe and does it so gas escapes, it will be liable for an explosion occasioned by the gas escaping because of the imperfect work. To undertake to do the work, and to do it imperfectly, is such an act of negligence as will render the company liable. Lanigan v. New York, etc., Co., 71 N. Y. 29.

a natural and ordinary one as to be properly chargeable to the defendant's negligent act or omission, and this is what has given rise to the doctrine of proximate cause. The negligence of the defendant must be the proximate cause of the injury, and it is the proximate cause thereof, if it can be properly said to have produced the result complained of, in natural and continuous sequence, unbroken by any efficient intervening cause. The negligence charged may be the proximate cause, although not the immediate one; it is enough if it be the efficient cause which set in motion the chain of circumstances leading up to the injury."[47] Abundance of illustrations will be found in these pages of the principle thus laid down.[48] Where a complaint alleged that the gas company negligently failed to turn off the gas from a tenement, after directions so to do, in order that a defect in the pipe within the cellar might be located and repaired; and that the plaintiff, a plumber, while searching for the defect, was injured by an explosion, it was held that it did not show the injury was the proximate cause of the gas company's negligence; for there was a presumption that there had been an intervening responsible agency, for which such company was not responsible.[49]

[47] Alexandria Mining, etc., Co. v. Irish, 16 Ind. App. 534; 44 N. E. Rep. 680.

[48] An illustration came under the personal observation of the writer. Natural gas escaped from a street main and entered a sewer. The gas company were negligent in permitting it to escape. It flowed along the sewer until it came to a manhole in the street, and escaped; and a horse's iron shoe striking upon the asphalt pavement surrounding the manhole produced a spark of fire which ignited the gas escaping from the manhole. An explosion was thereby occasioned and the horse injured. The gas company settled for the injury occasioned by the explosion.

[49] McGahon v. Indianapolis, etc., Co., 140 Ind. 335; 37 N. E. Rep. 601; 29 L. R. A. 355.

If the gas escaped from the consumers own defective pipe and injures a stranger, the gas company is not liable. Wolff v. Shreveport, etc., Co., 138 La. 743; 70 So. 789.

Three boys were playing marbles in a street. A gas company, in construction and operation of its gas lines, constructed and maintained, for the purpose of turning on and off gas, certain gate valves incased in a wooden box which extended to the surface of the ground. The company allowed this box to become so defective that large amounts of gas escaped from it. One of the boys' marbles rolled into this box; and in order to find it one of the boys got some paper and matches and lighted it. At the time the plaintiff was standing on the box. Instantly an explosion occurred, burning him severely. It was held

§ 692. Inspection of pipes or mains.

A gas company is chargeable with notice of the fact that gas pipes and mains are liable to rust and decay, and by reason of such rusting or decaying permit gas to escape.[50] They are also chargeable with notice of the liability of pipes and mains laid in streets to become broken by reason of the travel in the streets or of the settling of the earth, especially when sewers have been or are being constructed or other pipes laid therein, or the streets are being repaired. And in these modern times when the use of electricity has become so universal there is no doubt that they are chargeable with notice of its effect upon iron or steel pipes, and its tendency to destroy the fibres of the iron or steel, weaken the pipes and render them unsafe instruments for the conveyance of gas.[51] Being thus chargeable, a duty devolves upon gas companies to inspect their pipes and mains and the connections therewith. It must use reasonable care in making these inspections; and if a leak could have been discovered and prevented by such an inspection, that fact of itself will be sufficient to charge the company with negligence, if it fail to make the inspection.[52] And this is true of a company that pur-

that defendant's negligence in failing to properly construct and keep its valve box in repair, and not the negligence of the child, was the proximate source of the accident. United States Natural Gas Co. v. Hicks, 134 Ky. 12; 119 S. W. 166; 23 L. R. A. (N. S.) 249; 135 Am. St. 407. See also Whiteman McNamare Tobacco Co. v. Warren (Ky.), 66 S. W. 609; 23 Ky. Law Rep. 2120, and Mayor v. Felder, 145 Ga. 440; 89 S. E. 423.

[50] Pritchard v. Consolidated Gas Co., 2 Pa. Super. Ct. 179; 39 W. N. C. 28.

[51] Siebrecht v. East River Gas Co., 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; Koplan v. Boston Gaslight Co., 177 Mass. 15; 58 N. E. Rep. 183.

[52] Pine Bluff, etc., Co. v. Schneider, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366; Rockford Gaslight Co. v. Ernst, 68 Ill. App. 300; Tiehr v. Consolidated Gas Co., 51 N. Y. App. Div. 446; 65 N. Y. Supp. 10; Consolidated Gas Co. v. Crocker, 82 Md. 113; 33 Atl. Rep. 423; 31 L. R. A. 785; Koplan v. Boston Gaslight Co., 177 Mass. 15; 58 N. E. Rep. 183; Taylor v. St. Joseph Gas Co., 185 Mo. App. 537; 172 S. W. 624; Dowler v. Citizens Gas & Oil Co., 71 W. Va. 417; 76 S. E. 845; Louisville Gas Co. v.

chases the plant of another company, with respect to such plant; for its liability is not dependent on its knowledge of the pipes' defective condition, or escaping gas; but upon its care in keeping the pipes in a reasonably safe condition, and using them so as to not unnecessarily injure persons and their property.[53] It has been held that it is a question for the jury whether a gas company which had no system of inspection, but waited for complaints before ordering an inspection, to detect a leak in the pipes, is chargeable with negligence.[54] In a Pennsylvania case it was said: "While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes or from any other cause within the circumspection of men of ordinary skill in the business.[55] It requires nothing unreasonable—it does not require that the company shall keep up a constant inspection all along its lines, without reference to the existence or non-existence of probable cause for the occurrence of leaks or escape of gas."[56] Where the company could have dis-

Guelat, 150 Ky. 583; 150 S. W. 656.

[53] Dow v. Winnipesaukee Gas, etc., Co., 69 N. H. 312; 41 Atl. Rep. 288; 42 L. R. A. 569.

[54] Pritchard v. Gas Co., 2 Pa. Sup. Ct. Rep. 179; Pritchard v. Gas Co., 39 W. N. Cas. 28.

[55] Citing Kibele v. City of Philadelphia, 105 Pa. St. 41; Holly v. Gaslight Co., 8 Gray 123; 69 Am. Dec. 273; Smith v. Gaslight Co., 129 Mass. 318.

[56] Koelsch v. Philadelphia Co., 152 Pa. St. 355; 25 Atl. Rep. 522; 34 Am. St. Rep. 653; 18 L. R. A. 759; quoted in Consolidated Gas Co. v. Crocker, 82 Md. 112; 33 Atl. Rep. 423; 31 L. R. A. 785; State v. Consolidated Gas Co., 85 Md. 637; 37 Atl. Rep. 263.

covered the defect in its pipe by the smell of the escaping gas, if it had made a proper inspection, it was held that it was no defense in the company to show that it sent a workman to repair the pipe as soon as it had notice of the leak, he arriving too late to do so.[57] Of course, a gas company is required only to inspect its own pipes and apparatus.*[57] Strictly speaking, it has no right to enter upon private premises, except in so far as its own property extends; but the usual contract between a gas company and a consumer gives them the right to enter the premises and inspect the gas apparatus, not, however, imposing upon it, in terms, a duty to inspect. There is no doubt that if a gas company undertake the inspection of the pipes and gas fixtures of a house or building they are bound to exercise diligence in discovering leaks or escaping gas, the same as if they were their own pipes and fixtures.[58] A gas company may insist upon the right to enter on the premises and inspect the pipes and gas fixtures, before turning on a supply of gas, to see if they are in a fit condition to receive it;[59] but it in fact is not bound to do so, for it may take the property owner's assurance that all things have been made safe for its reception, or it may refuse to furnish him gas, unless it be given the right to inspect. If, therefore, after such assurance the company should turn on the gas, which should escape at a point beyond the place where the company's duty to inspect ceases, and from the escaping gas an explosion occur, the neglect would be that of the property owner.

[57] Mose v. Hastings, etc., Co., 4 F. and F. 324; 13 Gas J. 231; Siebrecht v. East River Gas Co., 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; Consumers' Gas Co. v. Corbaley, 14 Ind. App. 549; 43 N. E. Rep. 237.

*[57] United Oil Co. v. Roseberry (Colo.), 69 Pac. Rep. 588. See Smith v. Pawtucket Gas Co., 24 R. I. 292; 52 Atl. Rep. 1078.

[58] Lannen v. Albany Gaslight Co., 46 Barb. 264; 44 N. Y. 459; Ferguson v. Boston Co., 170 Mass. 182; 49 N. E. Rep. 115. See Vallee es qualite v. New City Gas Co., 7 Am. Law Rev. 767; Bastian v. Keystone Gas Co., 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537.

[59] Flint v. Gloucester Gaslight Co., 3 Allen 343; 9 Allen 552.

and not that of the gas company.[60] An English case furnishes an illustration on this point. The plaintiff was the owner of a new house, which was divided into two separate flats, an upper and lower one, each flat having a separate entrance from the street. When he built the house, the plaintiff put in a service pipe from the street, running it under the hall door steps inside the wall of the house to the upper flat. The tenant of the upper flat gave notice to the gas company to supply his flat with gas; and thereupon the company made connection between its main in the street and the service pipe, supplied and fixed a meter in the flat, and turned on the gas. Owing to a defect in the service pipe, which the plaintiff had supplied, leading to the meter, gas escaped and exploded, injuring the house, about an hour after it was turned on. In a suit to recover damages for injuries to the house, the court ruled that there was no duty resting on the gas company to test the service pipe; and the jury having found that proper connection had been made by the company between its main and the service pipe, judgment was given for it, the court not sustaining the plaintiff in his contention that if the company choose to use a pipe not laid by it, it was its duty to see if it were in good condition.[61] If the gas company had put in the defective service pipe, there would have been no doubt of its liability to the plaintiff.[62] Concealed openings in pipes made by strangers without the company's knowledge do not render the company liable for an explosion caused by escaping gas, unless it has knowledge thereof or of facts sufficient to put it upon inquiry respecting such openings, or to raise a reasonable sus-

[60] Holden v. Liverpool Gas Co., 3 C. B. 1; 15 L. J. C. P. 301; 10 Jur. 883.

[61] Henderson v. New Castle, etc., Gas Co., 37 Sol. J. 403.

A gas company is under no obligation to inspect attachments upon the premises of a consumer, where the attachments have been selected by the consumer. Middleton v. DeKalb County Gas Co., 158 Ill. App. 353.

[62] Burrows v. Marsh Gas and Coke Co., L. R. 7 Exch. 96; 41 L. J. Exch. 46; 26 L. T. 318; 20 W. R. 493.

When the evidence showed negligence on the part of the gas company, the admission of opinion evidence as to whether an inspection should have been made was held not judicial error. United Oil Co. v. Roseberry, 30 Colo. 177; 69 Pac. Rep. 588.

Whether or not a gas company is guilty of negligence in not inspecting a house that has been vacant for nearly a month, is a question for the jury. Baltimore Consolidated Gas Co. v. Getty (Md.), 54 Atl. Rep. 660.

It is not negligence contributing to the injury to a vacant house by a leakage and consequent explosion of gas, that the owner and his agent left the premises without inspection for almost a month. Consolidated Gas Co. v. Getty, 54 A. 660; 96 Md. 683.

If an agent of a gas company testifies that he inspected the prem-

picion of their existence.[62a] If a company cut off the gas at the meter valve, when the use of gas is discontinued, instead of at the street valve, its act is not negligence *per se;* but by so storing the gas in the service pipe leading to the meter the company subjects itself to the duty and burden of inspection, maintenance and repairs of such service pipes while it is thus used.[62b]

§ 693. Duty to make repairs immediately.—Available force.

It is not only the duty of a gas company to institute and maintain an efficient system of oversight and superintendence, but to be prepared with sufficient force ready to put in action and fully competent to supply and furnish a prompt remedy for accidents, defects, and the like.[63] This rule requires the company to take all necessary steps to prevent damages that may be occasioned by a leak as soon as it has knowledge of it; and, as elsewhere stated, it may be guilty of negligence in not discovering

ises and did not find gas escaping in dangerous quantities, a witness may testify that he told him at the time that there was gas enough in the cellar to blow up the house if he would go down into it with a light, in order to contradict him. Hunt v. Lowell Gaslight Co., 3 Allen 418.

A gas company is not required to uncover its pipes in search for leaks without reference to the previous existence or non-existence thereof. Morgan v. United Gas Imp. Co., 214 Pa. 109; 63 Atl. Rep. 417.

In making a search for leaks it is the duty of the gas company to use diligence to discover them. Southern Indiana Gas Co. v. Tyner, 49 Ind. App. 475; 97 N. E. 580.

[62a] Canfield v. West Virginia Consolidated Gas Co. (W. Va.), 93 S. E. 815.

[62b] Canfield v. West Virginia Central Gas Co. (W. Va.), 93 S. E. 815, distinguishing Creel v. Charleston Natural Gas Co., 51 W. Va. 129; 41 S. E. 174; 90 Am. St. 772.

[63] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233; Rockford, etc., Co. v. Ernst, 68 Ill. App. 300; Belvidere, etc., Co. v. Jackson, 81 Ill. App. 424; Barrickman v. Marion Oil Co., 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92; Otersbach v. Philadelphia, 161 Pa. St. 111; 28 Atl. Rep. 991; Anderson v. Standard Gaslight Co., 40 N. Y. Supp. 671; 17 N. Y. Misc. Rep. 625; Pine Bluff, etc., Co. v. Schneider, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366; Consolidated Gas Co. v. Connor, 114 Md. 140; 78 Atl. 725; Pulaski Gaslight Co. v. McClintock, 97 Ark. 576; 134 S. W. 1189, 1199; Hashman v. Wyandotte Gas Co., 83 Kan. 328; 111 Pac. 468; Windish v. People's Natural Gas Co., 248 Pa. 236; 93 Atl. 1003; Smith v. People's Natural Gas Co., 248 Pa. 246; 93 Atl. 1005; Manning v. St. Paul Gaslight Co., 129 Minn. 55; 151 N. W. 423; 129 Minn. 55.

No duty devolves upon the gas company to repair the pipes of the owner of the building, he owning the pipes. Harmer v. Brantford Gas Co., 13 Ont. W. Rep. 873; but it should cut off the gas if they are leaking. Memphis, etc., Co. v. Creighton, 183 Fed. 552.

such leak. If it has no knowledge of the leak until informed of it, and has not been otherwise guilty of negligence—as, for instance, not having used proper piping, or maintained a proper system of inspection—its liability will depend upon the question whether or not it has used due diligence to prevent the injury after it has received notice of the leak. The liability of the company turns upon the question whether it has used due care to prevent an injury after it has notice of the danger; and the care it must use, whether due care, must be measured by the possibility and likelihood of an injury being inflicted.[64] In an instance of this kind evidence, in defense, of the company's system and course of business in regard to complaints of leaks is admissible;[65] and also of the precautions it takes to repair leaks.[66] In the case of a great fire—as the Chicago and Boston fires—the celerity required in stopping leaks must be measured by their number, the extent of the territory over which they

[64] Hunt v. Lowell Gaslight Co., 1 Allen 343; Chisholm v. Atlanta Gaslight Co., 57 Ga. 28; Pine Bluff, etc., Co. v. McCain, 62 Ark. 118; 34 S. W. Rep. 549; Rockford Gaslight and Coke Co. v. Ernst, 68 Ill. App. 300; Consolidated Gas Co. v. Crocker, 82 Md. 113; 34 Atl. Rep. 423; 31 L. R. A. 785; Hoin v. Lancaster, 13 Lanc. L. Rev. 131; Mowers v. Municipal Gas Co., 126 N. Y. Supp. 1033; Gutekunst v. Municipal Gas Co., 126 N. Y. Supp. 1035; Southern Indiana Gas Co. v. Tyner, 49 Ind. App. 475; 97 N. E. 580; Louisville Gas Co. v. Fry, 147 Ky. 754; 145 S. W. 748; Dowler v. Citizens' Gas & Oil Co., 71 W. Va. 417; 76 S. E. 845; City Gas Co. v. Webb, 117 Va. 269; 84 S. E. 645.

Where a gas company knows of a defect in its service line it should either repair it or shut off the gas in the street; otherwise it is liable for damages due to the defect. Windish v. People's Natural Gas Co., 248 Pa. 236; 93 Atl. 1003; Windish v. People's Nat. Gas Co., 248 Pa. 246; 93 Atl. 1005.

[65] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233.

[66] Powers v. Boston Gaslight Co., 158 Mass. 257; 33 N. E. Rep. 523.

Unexplained defects in a company's gas pipes, allowing gas to escape and accumulate, is evidence of negligence. Morrison v. Superior W. L. & P. Co., 134 Wis. 167; 114 N. W. Rep. 434.

Gas escaping from an uncapped pipe. Kenney v. South Shore, etc., Co., 134 N. Y. App. Div. 859; 119 N. Y. Supp. 363.

Where a gas company sends its employee to repair a leak, negligence in repairing it is imputable to the company. Southern Indiana Gas Co. v. Tyner, 49 Ind. App. 475; 97 N. E. 586.

are spread, and the amount of available force obtainable to make the repairs. In such instances great energy is required of the company, because the danger is great, but not the impossible.[67]

§ 694. Notice of leaks.

It is the duty of a gas company as soon as it receives notice of a leak to take all necessary steps to prevent an explosion. It matters not through what sources it receives information that there is a leak, it must at once act. It cannot be expected that a gas company will repair a leak of which it has no notice; but it may be guilty of negligence in not discovering it, and if it is, it will be liable for damages occasioned by that leak.[68] Any one may give the company notice of the leak, and it will be bound by it. In one case it was said that "any inmate of plaintiff's family was competent and had a right to communicate to the defendants that the gas was escaping from some leak in their pipes into the house, making its occupancy either unsafe or disagreeable or offensive"; that it was proper for the plaintiff's wife to send a message to the company to that effect by any person to whom she thought fit to intrust it; and that it was immaterial how, by what means, or through whom it obtained information, so that it was sufficient to inform them of the leak.[69] In an action for damages occasioned by gas escaping into plain-

[67] Hutchinson v. Boston Gaslight Co., 122 Mass. 219.

[68] Pine Bluff, etc., Co. v. Schneider, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366; State v. Consolidated Gas Co., 85 Md. 637; 37 Atl. Rep. 263; Siebrecht v. East River Gas Co., 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; Diehle v. United Gas Imp. Co., 225 Pa. 494; 74 Atl. Rep. 349; Morrison v. Superior, etc., Co., 134 Wis. 167; 114 N. W. Rep. 434.

Where the complaint charged that the company negligently permitted its mains to become defective, and also charged that the company knew, or by ordinary care might have known, of the defective condition of the main; and the proof showed that the company did have knowledge of such defective condition, it was held proper to predicate an instruction both upon the complaint and proof, and permit a recovery for defendant's negligent omission to prevent the escape of gas after knowing of the leak. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81; 102 S. W. Rep. 608.

[69] Hunt v. Lowell Gaslight Co., 1 Allen 343.

tiff's cellar from a break in the main pipe in the street, it was decided by the court "that if the defendant's servants, the officers of the company, did not know, and by the use of due care could not ascertain, that the gas was escaping into the plaintiff's house, or had reasonable cause to believe that it was not, and no notice was given by the inmates of the house to them that gas was in the house, the defendant is not liable; but if they did know, or if, with their knowledge of the condition of the street, they had reasonable cause to suspect that the gas had entered or was entering the plaintiff's house in dangerous quantities, and gave no notice to the inmates, the company is liable in damages if the plaintiff used due care." [70] So where the explosion took place in a factory supplied neither with gas nor gas pipes, the street line being within a few feet of the cellar wall; and a few months before a sewer connection for the building had been made which passed under the street line; the claim being made that the gas escaped from a break in the pipe, passed through the sand until it reached the sewer pipe, and followed that into the cellar, and there collected; in support of the claim testimony being given that escaping gas had been detected at that point for several weeks prior, and that soon afterwards an old rusty break in the gas pipe immediately in front of the premises was discovered; and that the company was notified, more than two weeks before the accident, of the presence of escaping gas in the neighborhood, but did nothing in response thereto; it was held that the case should go to the jury, even though the company denied receipt of the notice, and gave evidence in rebuttal of the plaintiff's case generally.[71] Where the gas escaped from the defective pipes of a plant the company had purchased, the court held that the company's liability was not dependent on its knowledge of the pipes' defective condition or of the escaping gas, but on the observance of care by it in keeping the pipes in a reasonably safe condition, and using them so as to not unnecessarily injure others.[72]

[70] Bartlett v. Boston Gaslight Co., 122 Mass. 209.

[71] Henderson v. Allegheny Heating Co., 179 Pa. St. 513; 39 W. N. C. 485; 36 Atl. Rep. 312.

[72] Dow v. Winnipesaukee Gas, etc., Co., 69 N. H. 312; 41 Atl. Rep. 288; 42 L. R. A. 569.

A gas company, which through its pipes supplies gas to a house, and

§ 695. Notice.—Failure to discover place of leak.

If a company has notice that gas is escaping, it must prevent its escape at its peril. The apparent quantity escaping is immaterial; for it is bound to investigate thoroughly the place where it is escaping and prevent such escape; and if it fall into error concerning the probable danger, believing that only a small quantity is escaping, and the gas in fact escapes in sufficient quantity to be dangerous, the company will be liable for its error in estimating the danger, and cannot shift the loss occasioned by the explosion upon the person injured in his property or person.[73] So if the company believes the gas is escaping at a particular place, and there attempts to prevent its escape by repairing the supposed defect in its pipe or apparatus, when in fact the leak is at another place, it will be liable for all the consequences following from the gas escaping.[74] But where the leak was apparently a small one, and the gas company's workmen searched for it with a light, it was held to be a ques-

has control of the apparatus for cutting off the same, when notified that gas is escaping in the house, and is informed of injury and danger therefrom, owes a duty to such occupants to exercise reasonable diligence in shutting off the gas therefrom, and it is immaterial that the pipes where the leak occurred were owned by the owner of the house. Memphis Consolidated, etc., Gas Co. v. Creighton, 183 Fed. 552.

[73] See Otersbach v. Philadelphia, 161 Pac. St. 111; 28 Atl. Rep. 991. Anderson v. Standard Gaslight Co., 40 N. Y. Supp. 671; 17 N. Y. Misc. Rep. 625.

The burning of escaping gas on the streets on which the defendant's pipes are laid in a densely populated section of the city, justifies a finding that the defendant knew, or should have known, of the defective condition of its pipes. Hashman v. Wyandotte Gas Co., 83 Kan. 328; 111 Pac. 468; Consolidated Gas Co. v. Connor, 114 Md. 140; 78 Atl. 725.

[74] Consolidated Gas Co. v. Crocker, 82 Md. 113; 34 Atl. Rep. 423; 31 L. R. A. 785; Pine Bluff, etc., Co. v. Schneider, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366; Feely v. National Packing Co. (La.), 75 So. 837; Southern Indiana Gas Co. v. Tyner, 49 Ind. App. 475; 97 N. E. 580; Luengene v. Consumers L. H. & P. Co., 86 Kans. 866; 122 Pac. 1032.

It is negligence in a gas company to permit its gas to enter into a building when it knows its pipes are defective. Even though it search for leaks unsuccessfully, yet if it permit gas to flow into the house it will be liable for all damages thereby occasioned. Southern Indiana Gas Co. v. Tyner, 49 Ind. App. 475; 97 N. E. 580.

tion for the jury whether the action of the workmen was negligent.[75]

§ 696. Notice of leak, when not necessary to fix liability.

It is the duty of a gas company to employ safe and sound mains or pipes for carrying gas to its customers. It must exercise due care in selecting and laying them, with a view to prevent leaks. If it does not exercise such care in selecting and laying them, or if it knowingly lays defective pipes and mains, it cannot insist that it had no notice of the leak that caused the damages. In such an instance it is chargeable with notice of their condition; and if a leak occur by reason of which damage is done to property or persons it will be liable, although it had no notice of the leak.[76]

[75] Ellis v. London Gaslight Co., 32 Gas J. 849. See Richmond Gas Co. v. Baker, 146 Ind. 600; 45 N. E. Rep. 1049; 36 L. R. A. 683. See Bastian v. Keystone Gas Co., 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537.

In an action for damages, caused by a leak in a gas main in a street, evidence that there were several leaks in adjacent houses, of which the defendant was notified, but the odor of gas was not traceable to leakages from the street main, was not sufficient to charge the defendant with notice of the leak which caused the injuries. Mowers v. Municipal Gas Co., 126 N. Y. Sup. 1033; Gutekunst v. Municipal Gas Co., 126 N. Y. Sup. 1035.

It is negligence on the part of a gas company to permit its gas to flow into the pipes of a building, where it knows or is chargeable with knowledge that the pipes leak. Southern Indiana Gas Co. v. Tyner, 49 Ind. App. 475; 97 N. E. 580.

[76] Aurora Gaslight Co. v. Bishop, 81 Ill. App. 493; Hampton v. Cradley Heath Gas Co., 14 Gas J. 606; Smith v. Boston Gaslight Co., 129 Mass. 318; Crane v. Columbus Construction Co., 73 Fed. Rep. 894; 46 U. S. App. 52; 20 C. C. A. 233; United Oil Co. v. Roseberry (Colo.), 69 Pac. Rep. 588; Sipple v. Laclede Gaslight Co., 125 Mo. App. 81; 102 S. W. Rep. 608.

"It was not necessary to aver that appellant knew the gas was escaping from the broken pipes and percolating through the ground to the place of the explosion. If the appellant had knowledge of the imperfect condition of the pipes as charged, it was bound to know also that gas would escape. This was one of the natural results of the appellant's negligence and for these it is responsible." Alexandria Mining, etc., Co. v. Irish, 16 Ind. App. 534; 44 N. E. Rep. 680.

§ 697. Evidence of notice to gas company of danger to mains.

It is always admissible to show that the gas company had notice of danger to its mains and pipes, from whatever cause, when the charge is that the pipes were broken because of such threatened danger and not repaired within proper time. Illustrations of this rule are excavations in the public streets in the near proximity to the mains or pipes that were broken by reason of such excavations. Thus where gas escaped from a broken pipe in the street, the break being occasioned by reason of a subway being constructed in the street, a letter from the chief engineer of the construction company to the superintendent of the gas company relative to its pipes and offering facilities to it to examine and care for them; and also testimony of conversations between the engineer of the construction company and the engineer of the gas company in which the latter was recommended to have an inspector on the line of work, were held admissible on the ground that it tended to show to the gas company the peculiar dangers to which the pipes were exposed and the opportunity afforded it to guard against them.[77] Where a gas company had repeatedly repaired a cracked elbow it had put in, that was held to be sufficient evidence of notice of the defect and to hold it liable for a failure to remove it or to close the crack.[78] So it may be shown that the company was directly notified of the escaping gas—such as a notice to its pipe line walker[79]—that workmen were seen digging at the place for breaks in the gas pipes with tools branded with the initials of the company—the same brands as were on the tools of the men who fixed the break after the explosion—in order to show knowledge on the company's part that the pipe in that locality

[77] Koplan v. Boston Gaslight Co., 177 Mass. 15; 58 N. E. Rep. 183.

Where gas escaped from an uncapped pipe, declarations by an employee of the gas company, sent to the house to install a gas meter and make a test of the pipes in the house, made to plumbers at the house, to the effect that he would make the test, though the pipes had been tested, was held admissible as part of the *res gestae*. Kenney v. South Shore, etc., Co., 134 N. Y. App. Div. 859; 119 N. Y. Supp. 363.

[78] Richmond Gas Co. v. Baker, 146 Ind. 600; 45 N. E. Rep. 1049; 36 L. R. A. 683; Consumers' Gas Trust Co. v. Corbaley, 14 Ind. App. 549; 43 N. E. Rep. 237.

[79] Consumers' Gas Trust Co. v. Perrego, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146.

frequently leaked.[80] Testimony by a former occupant of a building that gas was smelled in the cellar a year previous to the time of the explosion was held admissible, where there was other evidence of such a smell after such occupant left the building, and extending up to about the time of the explosion.[81]

§ 698. Evidence of other leaks.

Evidence of a leak from which gas escaping did not cause the injury is not admissible, although gas escaping from a leak did cause the injury; but if gas from both of them combined to any extent, then evidence of both leaks are admissible. But if the charge is that the gas pipes were old and decayed, or had been injured by the soil in which they were laid, or by electrolysis, then evidence of other leaks near by or in the same neighborhood, where the conditions are the same, is admissible to show that the gas company had notice that the pipes had become decayed by long use, or affected by the nature of the soil, or by electrical action, at the place from which it is charged the gas escaped, and consequently fix upon it the charge of negligence in not finding and repairing the particular defect.[82]

[80] Lewis v. Boston Gaslight Co., 165 Mass. 411; 43 N. E. Rep. 178; Sipple v. Laclede Gaslight Co., 125 Mo. App. 81; 102 S. W. Rep. 608.

Evidence that the horse injured was on the right side of the street is not such a fatal variance as will defeat a plaintiff who alleges that the horse was on the left side; nor is the verdict erroneous when such a variance is specifically shown by the finding. Alexander Mining, etc., Co. v. Irish, 16 Ind. App. 534; 44 N. E. Rep. 680.

[81] Werner v. Ashland Lighting Co., 84 Wis. 652; 54 N. W. Rep. 996.

Where odors and other indications of the escape of gas appeared and certain persons effected called the gas company by telephone, making complaint thereof and asking that some one be sent to investigate the matter, and thereupon a man came and made such investigation, evidence of these facts was held competent because tending to show notice to the gas company; so it was held that a letter by the mayor of the city to the gas company calling attention to numberable explosions was admissible for the same purpose, although the location of the particular defect was not stated in it. So testimony of the superintendent of the gas company that he had read notices of gas explosions in the city was held admissible upon the question of notice of the leakage. Luengene v. Consumers' L. H. & P. Co., 86 Kan. 866; 122 Pac. 1032.

[82] Emerson v. Lowell, 3 Allen 410. This case is not exactly in point; but it is believed that the proposition laid down in the text is supported by it in principle. See § 697, 281.

In an action for injuries to a building by explosion of gas negligently permitted to escape between the walls, floors, and studdings thereof, evidence of the effect of the explosion on another building in the neighborhood was inadmissible. Linforth v. San Francisco Gas & Electric Co., 156 Cal. 58; 103 P. 320.

§ 699. Evidence of leaks.

In proving a leak in a street main, from which the escaping gas caused an injury by explosion, the testimony of persons residing in the neighborhood, to the effect that they had smelt gas for some time and on the day of the explosion, is admissible, on the theory that it tended to prove the leak.[83] Nor is the evidence of witnesses, to the effect that they had perceived an odor indicating the escape of gas from certain street mains, rendered incompetent by subsequent evidence assigning another cause for the odor.[84] And a witness may testify that the odor was similar to the odor of escaping gas elsewhere several months before, the purpose being not to prove another leak, but merely to identify the odor.[85] Evidence of the condition of the ground through which the gas escaped into the house injured by the explosion—such as it was blackened by the gas, and would burn when a light was applied to it—as well as that gas flowed from the defect in the pipe after the explosion, is admissible.[86] Where the charge was that the gas escaped into a sewer and thence into plaintiff's house, in order to show that the gas company did not use due diligence in finding and stopping the leak after notice, it was held proper to show by witnesses passing along the street to what extent the gas escaped in the street and also that it escaped from the same sewer through which it reached plaintiff's house into other houses at points beyond, if the company had notice of that fact; but it was not admissible to show that wherever the gas escaped into other houses sickness followed.[87] It may be shown that the ground was frozen and the gas could not escape into the air; but would naturally follow along any opening under the frozen surface.[88]

[83] Koplan v. Boston Gaslight Co., 177 Mass. 15; 58 N. E. Rep. 183; Consumers' Gas Trust Co. v. Perrego, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146; Smith v. Boston Gaslight Co., 129 Mass. 318; Siebrecht v. East River Gas Co., 21 N. Y. App. 110; 47 N. Y. Supp. 262; Cohen v. Consolidated Gas Co., (N. Y.) 121 N. Y. Supp. 956.

[84] Koplan v. Boston Gaslight Co., *supra*.

[85] Koplan v. Boston Gaslight Co., *supra*.

Evidence of odor two years before, in the vicinity of the house where the explosion took place, was held admissible. Hartman v. Citizens' Nat. Gas Co., 210 Pa. 19; 59 Atl. Rep. 315.

[86] Consumers' Gas Trust Co. v. Perrego, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146.

[87] Emerson v. Lowell, 3 Allen 410.

[88] Siebrecht v. East River Gas Co., 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262.

Where the evidence showed that

§ 700. Breaks occasioned by ordinary use of streets.

A gas company is bound to lay its pipes in such a manner that the ordinary use of the streets for traffic will not break them; and to not do so is an act of negligence.[89] And the same is true in regard to an instance of repair of a street. Thus where, in repairing a street, a heavy steam roller passed over its surface several times, breaking water pipes from which water bubbled up to the surface, and shortly an explosion occurred, the municipal corporation, which owned the gas pipes, were held liable, although the pipes were laid under thirteen inches of granite and concrete, which was equivalent to thirty inches of earth, a witness testified. It was shown that the roller had broken pipes at other times; and that pipes had been broken through a subsidence of the ground, which was loose and shifting. It was also shown, however, that the roller sometimes had gone over the ground without breaking pipes.[90] But a gas company is not liable if its pipes be broken by a pressure over which it has no control, where gas leaks from the breaks and explodes, if the breaks could not have been reasonably foreseen.[90a]

three couplings, one of which was defective, was found in the meter room after the explosion, that three new couplings, similar to the three found, had been put in the meter room, and that on the morning of the explosion, and within a short time thereafter, the owner had observed an employee of the gas company in the meter room with couplings, the court properly admitted the couplings in evidence. Linforth v. San Francisco Gas & Electric Co., 156 Cal. 58; 103 P. 320.

[89] Brown v. New York Gaslight Co., Anthon N. P. 351; Aurora Gaslight Co. v. Bishop, 81 Ill. App. 493; Hampton v. Cradley Heath Gas Co., 14 Gas J. 606.

[90] Pocock v. Brighton, 31 Gas J. 429.

[90a] Tidy v. Cunningham, 22 D. L. R. (Ont.) 151; 21 B. C. R. 53; 7 W. W. R. 1205; 30 Wh. L. R. 547.

Negligence of county officers in ordering the plaintiff operator of a steam roller to pass over a gas main was held not to excuse gas company from liability for plaintiff's injuries in an explosion. McWilliams v. Kentucky Heating Co., 166 Ky. 26; 179 S. W. 24; L. R. A. 1916 A 1224.

Where an oil pipe line company purchased the right to locate its pipes through a farm and placed them 16 inches below the surface, and a subsequent purchaser, knowing of their location, employed a contractor to erect a coke oven, and a subcontractor making excavation connected with a pipe line with a steam shovel which was thereby destroyed by fire, the pipe line company, in the absence of notice that the land was to be used for other than agricultural purposes, and in the absence of other circumstances charging it with the duty of marking the route of the pipe line was held not liable to a contract. Clement v. United States Pipe Line Co., 253 Pa. 187; 97 Atl. 1070.

§ 701. Action of frost.

It is the duty of a gas company to lay its pipes sufficiently deep, so that they will be beyond the action of frost. This is true with respect to its power to supply its consumers; for if it were to lay its pipes so near the surface that frost would prevent the flow of gas in extreme weather, it would not be performing its duty towards its consumers. So if pipes were thus laid and the pipes should be broken by reason of the frost, permitting gas to escape to the injury of a person, the company would be liable; although it should immediately stop the leak, enough gas having escaped to cause the damage.[91]

§ 702. Pipes breaking from lack of support.—Excavations near pipe line.

If the gas company has laid its pipes or mains in improper soil—in other words, if they are not properly supported—it is chargeable with notice of the tendency of such soil to sink or subside, leaving the pipes or mains without proper support, whereby they are broken. The improper laying of a gas pipe is an act of negligence; and if for that reason it break, gas escape, and an explosion inflict an injury, it will be liable, the plaintiff not contributing thereto.[92] Evidence of the existence in the street of holes and depressions is admissible to show that the gas company knew, or should have known, that the street was likely to settle and cause its pipes therein to break.[93] If ex-

[91] Rockford Gaslight and Coke Co. v. Ernst, 68 Ill. App. 300; Schermerhorn v. Metropolitan Gaslight Co., 5 Daly 144; Thompson v. Cambridge Gaslight Co., 201 Mass. 77; 87 N. E. Rep. 486. In Hampton v. Cradley Heath Gas Co., 14 Gas J. 606, it is said that a gas company is not liable if a pipe is broken by a change in the weather. See also Gould v. Winona Gas Co., 100 Minn. 258; 111 N. W. Rep. 254; 16 L. R. A. (N. S.) 889 (escape of gas not discovered until following June).

[92] Aurora Gaslight Co. v. Bishop, 81 Ill. App. 493; Crane Co. v. Columbus, etc., Co., 73 Fed. Rep. 984; 46 U. S. App. 52; 20 C. C. A. 233; Siebrecht v. East River Gas Co., 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; Metzger v. Schultz, 16 Ind. App. 454; 43 N. E. Rep. 886; 45 N. E. Rep. 619; Heh v. Consolidated Gas Co., 201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819; Thompson v. Cambridge Gaslight Co., 201 Mass. 77; 87 N. E. Rep. 486.

[93] Lewis v. Boston Gaslight Co., 165 Mass. 411; 43 N. E. Rep. 178; Koelsch v. Philadelphia, 152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653; Heh v. Consolidated Gas Co., 201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819.

cavations are made in the street near the company's mains, it must examine such excavations, in order to see how they may affect its mains, take all necessary steps to prevent the earth so settling as to not break them. Thus, where it appeared that the leak was caused by a failure of the city in constructing a sewer to properly pack the earth, whereby the gas main that broke was allowed to settle; it was held that the question whether or not the gas company had used due diligence to see that the earth was properly put back so as to support its pipes was properly left to the jury.[94] In a like case where the gas had been leaking for a day before the injury, it was held proper to give the jury an instruction that the plaintiff could not recover if the city did not properly tamp the earth when replacing it, if the defendant was ignorant of that fact, and the surface of the earth did not show the defective tamping, there being evidence that tests could easily have been applied to determine whether or not the dirt was properly tamped.[95] Where a gas company had no notice of the excavation, nor of gas escaping, nor that its pipe had been deprived of its support; and the traffic on the street caused it to break, letting the gas escape for two or three days before the explosion, it was held that the character of the break, the length of time the gas was escaping, and the absence of any one on behalf of the company at the time and the place of the excavation, constituted evidence of negligence on its part; and the appeal was dismissed.[96] The fact that the excavation is made by the city, or by a city contractor, in building a sewer or making other public improvements, does not relieve the gas company, where the failure to repair is the proximate and not the remote cause of the accident.[97] Where the charge was negligence in not stopping a leak in the main, a notice issued by the company to its consumers, calling attention to the

[94] Butcher v. Providence Gas Co., 12 R. I. 149; 34 Am. Rep. 626; Price v. South, etc., Gas Co., 65 L. J. Q. B. 126; 12 T. L. R. 31. See Vickerman v. Leeds, etc., Co., 15 Gas J. 654; Chadwick v. Corporation of Wigan, 28 Gas J. 562.

[95] Greaney v. Holyoke, 174 Mass. 437; 54 N. E. Rep. 880.

[96] Price v. South, etc., Co., 65 L. J. Q. B. 126; 12 T. L. R. 31.

[97] Oil City Gas Co. v. Robinson, 99 Pa. St. 1. In this case the gas company had notice of the leak sufficiently long before the explosion to have repaired it.

liability of leaks occurring from the digging up of streets by various corporations, copies of which had been distributed by its agents within a year prior to the accident, was held admissible in evidence on the question of due care on the part of the company.[98]

§ 703. Property owner's duty to notify gas company of leaks.

The duty of notifying a gas company of a leak on his premises is imposed upon its owner, and he must give the company notice of it as soon as, or at least within a reasonable time after, he discovers it. The time within which he must give the notice depends upon the amount of gas escaping and the danger that will probably be incurred by delay. If the leak should be insignificant in amount, there is not that urgency required as if it was in a large amount. The leak may be apparently insignificant in amount, and yet still be very considerable. In such an instance the property owner is justified in measuring his conduct by the appearance of things; yet even here, as escaping gas is a very dangerous thing, he is required to act with that promptitude commensurate with the probable danger. In one case, to recover damages occasioned to his health by escaping gas, the court ruled that if the plaintiff discovered the leak early enough in the day to have had it repaired by night, if he had at once notified the company, and if, in consequence of such neglect to notify it, the leak was not repaired that night, and the plaintiff was injured by the escaping gas, such delay in giving notice would be evidence to be considered by the jury

[98] Powers v. Boston Gaslight Co., 158 Mass. 257; 33 N. E. Rep. 523.

The fact that no nails, wire or chain was found after an explosion of a gas pipe, is not sufficient to show that the pipe was not supported at the time the premises were leased, where the undisputed evidence shows that the pipe was supported by a chain or wire suspended from a joist when first put in. Metzger v. Shultz, 16 Ind. App. 454; 43 N. E. Rep. 886; rehearing denied, 45 N. E. Rep. 619.

Upon the question whether the pipe was handled carefully and laid properly, a witness may not give his opinion as to whether the line was laid with proper skill or care, but he may give an opinion to show that men of experience and skill were employed, accompanied by a statement as to what carelessness or lack of skill there was in the execution of the work. Crane Co. v. Columbus, etc., Co., 73 Fed. Rep. 984; 46 U. S. App. 52; 20 C. C. A. 233.

of want of such ordinary care as would defeat the action, although the defendant may have been negligent.[99] In the case of escaping gas it is undoubtedly the duty of the owner of the premises to turn off the gas, if he can reasonably do so, until the servants of the company arrive and take charge of the gas apparatus.[100] Where foul ammoniacal water and odors had leaked into the plaintiff's cellar from a leak in a pipe, for nine months, to his damage; and he then gave notice to the gas company of the leak, and they repaired the leak within five days, it was held that he was not entitled to recover the damages he had suffered within such five days, because of his failure to give notice when the leak began and during the period of nine months.[101] So where the leak was discovered at night; and plaintiff did nothing until the next morning, although all consumers were requested on the back of their bills to notify the gas manager at once in case a leak was discovered; and in the morning the plaintiff employed a plumber to search for the leak, who did so with a lighted candle, when an explosion followed, it was held that there was such contributory negligence as to prevent a recovery.[102] Plaintiff's house was ninety feet from the leak in the main of the defendant company. The gas passed under the frozen surface of the earth to her cellar. She was not a customer for the gas of the defendant, but was of another company. Owing to a disease, she was not able to detect the escaping gas by the odor. She opened the cellar door, and after a few minutes the gas flowed into a room where she had a lighted lamp, and an explosion was occasioned by the gas coming in contact with the flame of the lamp. It was held that her failure to notify the defendant of the leak, even though she knew of its existence, did not constitute contributory negligence. In such an instance it was only reasonable in her to

[99] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233; Hunt v. Lowell Gaslight Co., 1 Allen 343; Hills v. Gaslight Co., 13 Gas J. 877. See Parkin v. Wirksworth Gas Co., 26 Gas J. 946.

[100] Holden v. Liverpool, etc., Co., 3 C. B. 1; 15 L. J. C. P. 301; 10 Jur. 883.

[101] Hills v. Gaslight Co., 13 Gas J. 877.

[102] Parkin v. Wirksworth Gas Co., 26 Gas J. 946. See Bartlett v. Boston Gaslight Co., 122 Mass. 209.

suppose that the gas escaped from the pipes of the company supplying her with gas.[103]

§ 704. Company misleading plaintiff as to extent of danger.

If the gas company mislead the plaintiff concerning the extent of the danger he is incurring, or lulls his suspicions, whereby he is misled to his injury, it will be liable. In cases of doubt as to the danger, a person has a right to rely upon the representations of the servants or agents of the company; and even in cases where the danger appears to be a probable one, under the assurance of the servant or agent of the company, who the plaintiff knows ought to know whether or not there is danger, that there is none, the plaintiff may rely thereon, and recover if he is injured; unless he be as experienced in such matters as such servant or agent. And if the plaintiff is as experienced as the servant or agent of the company, yet if his knowledge is not such as to certainly show there is a danger; and such servant or agent, who the plaintiff believes, or has a right to believe, has a more accurate knowledge of the situation than he, by words or actions lulls his suspicions, and for that reason he does not take the precautions he otherwise would, and is injured, he can recover. Thus where a consumer smelt escaping gas, but was assured by the company's employee there was no leak, it was held that he was not guilty of such contributory negligence as would prevent a recovery for a loss occasioned by the leaking gas exploding.[104]

§ 705. Municipality operating plant.

If a municipality supplies gas to private consumers, it will be liable for the negligence of its servants, or for its negligent

[103] Consumers' Gas Trust Co. v. Perrego, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146.

When the plaintiff testified she never used gas, and did not know how it smelt, and did not know what caused the odor in the house on the morning she was overcome by it, it was held that she was not negligent, as a matter of law, in failing to notify defendant of the gas prior to the time notice was subsequently given by her husband. Thompson v. Cambridge Gaslight Co., 201 Mass. 77; 87 N. E. Rep. 486.

[104] Anderson v. Standard Gaslight Co., 17 N. Y. Misc. 625; 40 N. Y. Supp. 671; Richmond Gas Co. v. Baker, 146 Ind. 600; 45 N. E. Rep. 1049; 36 L. R. A. 683; Lee v. Troy, etc., Co., 98 N. Y. 115; Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285; 18 L. R. A. 215; affirming 41 Ill. App. 34; Washing-

acts, the same as an individual or private or semi-private corporations engaging in the same business and being guilty of the same negligence are liable.[105] It is held to the same degree of diligence and care.[106] The operation and maintenance of a gas or lighting plant by a city is a private corporate function as distinguished from purely governmental function, rendering the city liable the same as an individual.[107]

§ 706. Gas following supply pipe from main.—Percolating through soil.—Sewer.

Gas companies are chargeable with notice of the fact that the tendency of gas escaping from their mains in the street is to follow the supply pipe into the house supplied, especially where the soil is not packed closely around such supply pipe; that it has the same tendency to follow their mains; that when it enters a sewer it will follow that into the houses and that it will even percolate the soil, thereby reaching cellars and rising to other parts of the building. Gas may follow pipes for long distances, and through these avenues find its way into buildings, there exploding without any seeming connection between the place of

ton Gaslight Co. v. Eckloff, 7 App. D. C. 372; Wagner v. H. W. Jayne Chemical Co., 147 Pa. St. 475; 29 W. N. C. 490; 23 Atl. Rep. 772; Charron v. Union Carbide Co., 151 Mich. 687; 115 N. W. Rep. 718.

[105] Strawbridge v. Philadelphia, 13 Phila. 173; 36 Leg. Int. 276; 13 Rep. 216; Strawbridge v. Philadelphia, 2 Penny. 419; Littman v. New York City, 36 N. Y. App. Div. 189; 55 N. Y. Supp. 383; affirmed 159 N. Y. 559; 54 N. E. Rep. 1093; Shuter v. Philadelphia, 3 Phila. 228; 15 Leg. Int. 333; Esberg-Trust Cigar Co. v. Portland, 34 Ore. 282; 55 Pac. Rep. 961 (water); Ottersbach v. Philadelphia, 161 Pa. St. 111; 28 Atl. Rep. 991; Pocock v. Brighton, 31 Gas J. 429; Scott v. Mayor, etc., of Manchester, 37 Eng. L. & Eq. 495; 2 H. and N. 204; 26 L. J. Exch. 132, 406; 3 Jur. (N. S.) 590; 5 W. R. 598; Chadwick v. Corporation of Wigan, 28 Gas J. 562; Boothman v. Mayor, etc., of Burnley, 20 Gas J. 585; Richmond v. Gay, 103 Va. 320; 49 S. E. Rep. 482.

[106] Iloin v. Lancaster, 13 Lanc. L. Rev. 131.

[107] Bullmaster v. St. Joseph, 70 Mo. App. 60; Greenville v. Branch (Tex. Civ. App.), 152 S. W. 478; Brantman v. Canby, 119 Minn. 396; 138 N. W. 671.

its escape and the place of explosion. In all such instances the original negligence is either failure to detect the leak or else the use of such pipes as in which in all reasonable likelihood leaks will occur. The apparent nature of the soil may be such, or the distance between the place of the leak and that of the explosion so great that no reasonable apprehension exists of gas traveling through such a soil or for such a distance; yet, nevertheless, either one of these facts will not defeat the action, the fact remaining that the gas was negligently permitted to escape, and that it actually did travel through the soil or the distance intervening between the place of the leak and the place of the explosion, the character of the soil and the length of the distance only adding to the improbability of the gas passing through it or traveling so far.[108] If it be alleged in the complaint that the gas in sufficient quantities passed from the mains through the soil to the house to cause an explosion, the court cannot take notice that the complaint charges an impossibility; but the mere allegation of that fact in the manner indicated is not sufficient to withstand a motion to make the complaint sufficiently definite as to show how the gas was conducted from the leak in the main to the house.[109]

[108] Fare v. Bath Gaslight Co., 25 Gas J. 566; Vickerman v. Leeds New Gas Co., 15 Gas J. 654; Brown v. Illius, 27 Conn. 84; Hunt v. Lowell Gaslight Co., 1 Allen 343; Holley v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233; Smith v. Boston Gaslight Co., 129 Mass. 318; Medex v. Gaslight and Coke Co., 15 Gas J. 75; Littman v. New York, 159 N. Y. 559; 54 N. E. Rep. 1093; affirming 36 N. Y. App. Div. 189; 55 N. Y. Supp. 383; Richmond v. Gay, 103 Va. 320; 49 S. E. Rep. 482; Bandler v. People's Gaslight & Coke Co., 108 Ill. App. 187; Coffeyville Mining & Gas Co. v. Carter, 65 Kan. 565; 70 Pac. Rep. 635; Watson v. Kentucky, etc., R. Co., 137 Ky. 619; 126 S. W. 146; 129 S. W. 341; 34 Ky. L. Rep. —.

[109] Mississinewa Mining Co. v. Patton, 129 Ind. 472; 28 N. E. Rep. 1113; 28 Am. St. Rep. 203. See cases of percolating through soil. Consumers' Gas Trust Co. v. Perrego, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146 (ground frozen on surface); Consolidated Gas Co. v. Crocker, 82 Md. 113; 33 Atl. Rep. 423; 31 L. R. A. 785; Alexandria Mining, etc., Co. v. Irish, 16 Ind. App. 534; 44 N. E. Rep. 680; Consumers' Trust Co. v. Corbaley, 14 Ind. App. 549; 43 N. E. Rep. 237; Siebrecht v. East River Gas

§ 707. Withdrawing gas from mains without notice.

A gas company may be liable for negligence in withdrawing its gas without notice and for failure to give notice of its return. In this instance both acts must have been negligent. Thus where a consumer lighted the gas in a grate, lay down and went to sleep; after which the gas company withdrew the supply without notice and then turned it on without giving notice it had done so, and the gas escaped into the room and injured the person so asleep, he having remained continuously asleep from the time he lay down until awakened by the escaping gas, it was held that the company was liable.[110] To withdraw gas from

Co., 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262 (a frozen surface); Heh v. Consolidated Gas Co., 201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819; People's Gaslight Co. v. Amphlett, 93 Ill. App. 194; Henderson v. Heating Co., 179 Pa. St. 513; 36 Atl. Rep. 312.

In an Indiana case it was held that the manager of a public service natural gas company having turned on the gas at the street valve to let it into the pipes in the house, and then, on discovering that it was leaking somewhere, undertook to turn it off, was negligent in not turning it off at the street valve, but instead turning it off at the house valve—thus allowing the gas escaping from a break in the pipe between such valves to get through the wall into the cellar, where an explosion occurred — though the plumbing had previously been tested, and then found to be secure; and that his negligence in turning the gas off at the house valve, instead of the street valve—thus allowing the gas to get into the cellar from the leak between the two valves —was a *concurrent cause* of an explosion occurring while the plumber employed by the owner of the house was searching for the leak; making the company liable for injury to the tenant, who was not at fault, though the agency acting on the gas to cause the explosion is not shown. Huntington Light & Fuel Co. v. Beaver, 37 Ind. App. 4; 73 N. E. 1002.

Evidence merely that defendant maintained a gas well fifty feet from plaintiff's premises, and that gas accumulated in plaintiff's cellar, causing an explosion, and that gas was found in water wells within a radius of 200 feet of the gas well, is insufficient to warrant a conclusion that the gas came from defendant's well, or that defendant was negligent. Maxwell v. Coffeyville Mining & Gas Co., 68 Kan. 821; 75 P. 1047.

[110] Beyer v. Consolidated Gas Co., 44 N. Y. App. Div. 158; 60 N. Y. Supp. 628; Skogland v. St. Paul Gaslight Co., 89 Minn. 1; 93 N. W. Rep. 668.

A gas company must protect residents and property owners from damages arising from the escape of

the pipes of a house, without notice to the tenant or persons therein, when it is lighted; and to return it without notice, is a gross act of negligence on the part of the gas company, and a very dangerous thing to do.[111]

§ 708. Undue pressure in mains.

In some States the pressure in natural gas mains is regulated by statutes; but we are not aware that such a statute has been made applicable to artificial gas mains. Thus where a statute required a company to use sound wrought or cast iron pipes, to test them to a pressure of four hundred pounds to the square inch, and to not exceed a pressure of three hundred pounds in their use, it was held to be an act of negligence to not test the pipes or to use a forbidden pressure.[112] So it is an act of negli-

gas caused by the construction of a sewer. Portland Gas & Coke Co. v. Giebisch (Ore.), 165 Pac. 1004.

[111] See McKenna v. Bridge Water Gas Co., 193 Pa. St. 633; 45 Atl. Rep. 52; 47 L. R. A. 790.

To disconnect the pipes in the house without shutting off the gas is an act of negligence, which may render the gas company liable. Topolski v. Chicago, etc., Co., 150 Ill. App. 126.

Increasing pressure without notice. Indiana, etc., Co. v. Long, 27 Ind. App. 219; 59 N. E. Rep. 410.

Where natural gas was withdrawn from the pipes without notice, until the fires went out; and, the house having become cold, the mistress went into the cellar to turn up the gas in the furnace, or to see what was the matter, and finding no fire in the furnace, and supposing that the servant or some of her children had turned off the gas, and acting under this impression, no odor of gas being perceptible to her, and not examining the keys to see if it had been turned off, she threw a lighted match into the furnace preparatory to turning on the gas, but the furnace being full of gas from the fact that it had again been turned on (without notice), an explosion immediately followed, to her injury, it was considered by eminent counsel to whom the question of the company's liability was submitted, that she could not recover, because of her negligence in not ascertaining before throwing the lighted match into the furnace whether the gas had been returned into the pipes, or whether or not the keys were turned so as to shut it off.

[112] Alexandria, etc., Co. v. Irish, 16 Ind. App. 534; 44 N. E. Rep. 680; Barrickman v. Marion Oil Co., 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92; Consumers' Gas Trust Co. v. Perrego, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146; Indiana, etc., Co. v. Long, 27 Ind. App. 219; 59 N. E. Rep. 410.

gence to unduly increase the pressure of natural gas whereby the stoves and furnaces in which it is used become overheated and set fire to the buildings in which they are situated; and this is especially true if the pressure increases late at night when no one is around to watch the fires. And it makes no difference that such increased pressure arises from the fact that many consumers have turned off the gas, thereby increasing the supply for fires kept burning, or that the pressure at the gas wells increased; for the company is bound to anticipate such increase of pressure and turn its valves so as to prevent it.[113]

[113] Alexandria, etc., Co. v. Painter, 1 Ind. App. 587; 28 N. E. Rep. 113; Alexandria, etc., Co. v. Irish, *supra;* Indiana, etc., Co. v. New Hampshire, etc., Co., 23 Ind. App. 298; 53 N. E. Rep. 485; Ibach v. Huntington, etc., Co., 23 Ind. App. 281; 55 N. E. Rep. 249; Barrickman v. Marion Oil Co., 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92; Berns v. Gaston Coal Co., 27 W. Va. 285; Hollan v. Campton Fuel & L. Co., 127 Ky. 266; 105 S. W. Rep. 426; 32 Ky. L. Rep. 178; Marshall Window Glass Co. v. Cameron Oil & Gas Co., 63 W. Va. 202; 59 S. E. Rep. 959; Citizens' Gas, etc., Co. v. Whipple, 32 Ind. App. 203; 69 N. E. Rep. 557; Bandler v. People's, etc., Co., 108 Ill. App. 187.

It is negligence for a natural gas company to permit its regulators or other appliances to remain for an unreasonable time in a condition that they will not control the amount and pressure of gas furnished. Barrickman v. Marion Oil Co., *supra;* Citizens' Gas, etc., Co. v. Whipple, *supra.*

If the flow of gas is not of such pressure as to destroy the valve which the customer has to regulate the volume of gas which is supplied to his light or fire burners, the company is not liable for damages resulting from such flow. Hollan v. Campton Fuel & Light Co., 127 Ky. 266; 105 S. W. 426; 32 Ky. Law Rep. 178.

It is not error to not direct a verdict for the defendant gas company where the evidence shows that the fire might have been due to any one of other causes as likely as that of the company's negligence. Hollan v. Campton F. & L. Co., *supra.* In this case it was also held that evidence concerning the condition of the "by-path" and "regulator," which were the apparatus by means of which the pressure of the gas was regulated, were found the morning following the night of the fire, was not admissible. And it was still further held that the mere fact of explosion of a gas regulator, which up to that time had properly performed its functions, was not a circumstance to which the rule of *res ipsa loquitor* applied. *Ibid.*

§ 709. Evidence of undue pressure at other places.

The general rule is where it is charged that the company negligently so increased or permitted such an increase of the flow of gas as to overheat plaintiff's stoves or furnaces whereby his house was set on fire, that evidence cannot be given of the effect of such increase at other points where the company is furnishing gas; and in one case it was admitted by counsel that it must further be "shown that such overheated stoves were on the same low pressure pipe lines, received their fuel from the same supply under similar conditions, and through similar service pipes; that the mixers and burners were substantially the same; that the keys regulating the fires were turned down as in the stove which burned appellee's house, and that there was no intervening regulator or hindrance to obstruct the free and uniform flow of gas in such lines." In this case the court added: "In other words, to make such evidence competent, it was first necessary to show that the general condition of the other stoves was in all essential respects similar to the one that caused the injury. Such evidence, when the conditions are thus shown, is admissible;"[114] and the court proceeded to make a quotation from a West Virginia case,[115] in which it was said: "The condition and pressure of gas in the neighboring houses at the time of the fire, there being no intervening regulator or hindrance to the force of the gas between the burned house and the other houses mentioned, would clearly indicate what it was at the house of the plaintiff, and I see no valid objection to the answering of the questions." In the Indiana case in which the admission was made, as above stated, the court, after giving a summary of the evidence, said: "We think that all the witnesses who

[114] Indiana, etc., Co. v. Long, 27 Ind. App. 219; 59 N. E. Rep. 410.

[115] Barrickman v. Marion Oil Co., 45 W. Va. 634; 32 S. E. Rep. 327; 44 L. R. A. 92.

In making this admission the counsel admitting it evidently had in mind the case of Indiana, etc., Gas Co. v. New Hampshire, etc., Co., 23 Ind. App. 298; 53 N. E. Rep. 485.

testified as to the condition of other stoves, etc., on that night, brought themselves within the rule laid down in the cases cited. That is, we do not think that before it can be shown that other stoves were overheated than the one causing the injury, where the supply of gas is received from the same general source, that such other stoves were supplied by the same sized service pipes, the same kind of valves, and the same kind of mixers; that they were the same general distance from the mains, and that the keys were turned down in just the same way. Such a rule would be unreasonable, and the law does not require unreasonable things to be done. The rule only goes to the extent as to require similar conditions to be shown.[116] It would be folly to say that two persons living in different houses could testify or show to any degree of exactness, that they turned their keys just alike. But here it is shown that the service pipes were of different sizes, leading to different stoves, and yet the gas was forced through these different sized pipes where the keys were turned low to such a degree of pressure as to overheat the different stoves. The witnesses all received their gas from low pressure mains. It is not shown that the mixers were all alike, but it is shown that appellant furnished them, and we think all these facts make the evidence competent. Two witnesses were permitted to testify as to the high pressure of the gas used by them for illuminating purposes on the night appellee's property was destroyed. The gas so used by them was supplied from low pressure mains of appellant. It is shown that the gas used for illuminating purposes is supplied through different burners than those used for heating purposes; that the pipes are smaller as a rule and that where used for illuminating no mixers are used. It thus appears that in such case conditions are dissimilar from those where gas is used for heating,

[116] The court then cites Washington Tp., etc., Co. v. McCormick, 19 Ind. App. 663; 49 N. E. Rep. 1085; and Indiana, etc., Gas Co. v. New Hampshire, etc., Co., *supra*, and says that they "should be so construed."

although the supply is from the same general source. Under these circumstances we are inclined to the opinion that the evidence was not admissible under the sale herein declared."[117]

§ 710. Explosion caused by act of servant of gas company.

If the explosion is brought about by the act of a servant of the gas company, the question of negligence is still one for investigation; for the explosion may have been occasioned without any negligence on the part of the servant, in which event the company would not be liable. Whether or not the servant negligently occasioned the explosion is a question for the jury.[118]

[117] Indiana, etc., Gas Co. v. Long, 27 Ind. App. 219; 59 N. E. Rep. 410. The court, however, considered that the testimony of these two witnesses was harmless in view of the overwhelming evidence of the negligence of the defendant.

Where the suit was to recover the amount of a promissory note given in payment for gas to be supplied the maker, and in a counter claim the defendant asked damages for failure to comply with the contract to furnish gas, it was held error to admit in evidence the testimony of witnesses who received gas from the same main as defendant, to the effect that they had an insufficient supply of gas during the time in question, without showing that these connections were of the same or a similar character as that of the defendant, where it was the defendant's duty under the contract to conduct the gas from the main to his residence. Washington Tp., etc., Co. v. McCormick, 19 Ind. App. 663; 49 N. E. Rep. 1085.

Evidence of the customer's neighbors that along about the time the house burned the flow of gas through the pipes in their houses was unusually strong was competent, without proof that such houses were located with reference to the main line practically the same as the house burned and that the equipment for regulating the flow was practically the same, where the size of the town was such that the pipe and equipment were necessarily practically the same and the company did most, if not all, of the work of installation. Hollan v. Campton Fuel & Light Co., 127 Ky. 266; 105 S. W. 426; 32 Ky. Law Rep. 178. It was also held in this case that evidence of a witness who has tested the pressure an hour and a half before the fire, and who said he had found it above the reasonable and proper pressure, was not connected sufficiently close to the time of the fire to be admissible. *Ibid.*

[118] Hann v. Weymouth, etc., Co., 18 Gas J. 186; Lannen v. Albany Gaslight Co., 46 Barb. 264; 44 N. Y. 459; Ward v. Gaslight and Coke Co., 14 Gas J. 915; 15 Gas J. 45, 75; 16 Gas J. 10, 38, 74, 108; German Ins. Co. v. Standard Gaslight Co., 70 N. Y. Supp. 384; 34 N. Y. Misc. Rep. 594; Ferguson v. Boston Gaslight Co., 170 Mass. 182; 49

§ 711. Company undertaking to repair consumer's pipes or fixtures.

It has already been stated that if a gas company undertake to inspect a consumer's pipes in his house it is chargeable with the same degree of care as it is in the inspection of its own pipes. And this is true where it undertakes to repair such pipes or the consumer's fixtures. Thus, where a notice to consumers was printed on the back of its bills that as soon as a leak in the house was discovered the company should be notified; and a consumer notified the company of such a leak, whereupon a messenger sent to the house, who said he had come to repair the leak, which he said was in a chandelier in the front room; and after examining it, stayed about twenty minutes, and left, saying it was all right; and that night the plaintiff was injured by the escaping gas, the leak being in the pipe inside the casing of the chandelier—it was held that the company was liable. "Entering upon the work," said the court, "the defendant

N. E. Rep. 115; United Oil Co. v. Roseberry, 30 Colo. 177; 69 Pac. Rep. 588; Diehle v. United Gas Imp. Co., 225 Pa. 494; 74 Atl. Rep. 349; Hamma v. Haverhill Gaslight Co., 203 Mass. 572; 89 N. E. Rep. 1043; Kenney v. South Shore, etc., Co., 134 N. Y. App. Div. 859; 119 N. Y. Supp. 363; United Oil Co. v. Miller, 19 Colo. App. 46; 73 Pac. Rep. 627; Bradley v. Shreveport Gas Co., 142 La. —; 76 So. 230.

Where the negligence alleged was the opening of gas jets, and it was shown that the defendant had authority to supply gas to consumers, and that it was its duty to place meters in buildings to be supplied with gas, that an application had been made for a meter in an apartment, and that shortly after two men appeared with a meter and obtained the key and installed a meter in the basement, it was held to justify the inference that they were employees of the defendant. Heinz v. Consumers', etc., Co., 81 Kan. 261; 105 Pac. Rep. 527.

Where three servants testified they had not left the plug out of the end of a pipe, who would have been in fault if they had, there was held to be sufficient evidence that the gas company failed to plug it. United Oil Co. v. Miller, 19 Colo. App. 46; 73 Pac. Rep. 627. (See this case for an instruction on this point.)

A gas company must use ordinary precautions in putting gas in a house to abate danger from explosions. Collins v. Toronto, etc., Co., 13 Ont. W. Rep. 165, citing Parry v. Smith, 4 C. P. Div. 325.

was bound to do it with reasonable care."[119] The same rule of reasonable care was applied where the gas company insisted upon making all gas connections between the house mains and its pipes.[120]

§ 712. Injury to shade trees.—Shrubbery.

If a gas company permit gas to escape from its pipes or mains whereby shade trees or foliage in the street or upon adjoining grounds are injured or killed by such escaping gas it will be liable for the damages occasioned. The owner of property may recover for trees, destroyed by the negligent escape of gas, planted by him in the street immediately in front of his premises.[121] An instruction that the gas company is not liable,

[119] Ferguson v. Boston Gaslight Co., 170 Mass. 182; 49 N. E. Rep. 115; Anderson v. Standard Gaslight Co., 40 N. Y. Supp. 671; 17 N. Y. Misc. Rep. 625; United Oil Co. v. Roseberry, 30 Colo. 177; 69 Pac. Rep. 588; Laclede Gaslight Co. v. Cottone, 152 Fed. Rep. 629; 81 C. C. A. 471.

[120] Bastian v. Keystone Gas Co., 27 N. Y. App. Div. 584; 50 N. Y. Supp. 537. See also United Oil Co. v. Roseberry, 30 Colo. 177; 69 Pac. Rep. 588; and Smith v. Pawtucket Gas Co., 24 R. I. 292; 52 Atl. Rep. 1078; Consolidated Gas Co. v. Cannon, 114 Md. 140; 78 Atl. 725.

Acceptance by a gas company of an order to furnish meters and connections does not make it liable for damages to the plaintiff because of shortage in supply by defects in pipes in the building over which it had no control. Alverdes v. St. Paul Gaslight Co., 115 Minn. 318; 132 N. W. 275.

A gas company repairing pipes must keep the premises safe; and this duty continues after the work ceases until the premises are restored to their former condition. City Gas Co. v. Lawrence, 118 Va. 557; 88 S. E. 73. On leaving the premises, if the gas company's servant fails to close a trap door, and the owner on returning home falls through it with injury, the company is liable. Browder v. N. W. Gaslight Co., 182 Ill. App. 26.

If a plumber undertakes to connect a building with a gas main, and carelessly permits gas to escape from the pipes into the building, and an explosion of gas occurs therein he is liable, in the absence of an intervening independent cause, though the ignition was caused by some one other than himself. Moore v. Lanier, 52 Fla. 353; 42 So. Rep. 462.

[121] Rockford Gaslight Co. v. Ernst, 68 Ill. App. 300; Armbruster v. Auburn Gaslight Co., 18 N. Y. App. 447; 46 N. Y. Supp. 158; Rauck v. Cedar Rapids Gas Co., 116 Iowa 11; 89 N. W. Rep. 88; Gould v. Winona Gas Co., 100 Minn. 258; 111 N. W. Rep. 254; 10 L. R. A. (N. S.) 889;

unless it could reasonably have apprehended that escaping gas would cause the death of vegetation is erroneous; for the company is bound to know the effect of gas upon trees and vegetation.[122] Where evidence showed that the death of the trees was coincident with the leakage from the mains nearby of a large amount of gas; and that after the mains were recalked there was a renewed growth of vegetation, the verdict of the jury was not disturbed on appeal, although there was other evidence to show that the injury to the trees was not caused in the manner alleged.[123] It may be shown that other trees in the same vicinity were killed by gas leaking from the same place, where the charge is that the gas permeating the soil poisoned and killed the roots of the trees.[124] So where the charge is that the gas escaped into a sewer and thence into plaintiff's greenhouse, whereby his plants were killed, evidence is admissible to show the presence of gas in other greenhouses situated on the same sewer.[125]

Robbins v. Hartford City Gaslight Co., 82 Conn. 394; 74 Atl. Rep. 113; Johnson v. Northport, etc., Co., 50 Wash. 567; 97 Pac. Rep. 746; Fullerton v. Glen Falls Gas & El. Lt. Co., 157 App. Div. 191; 141 N. Y. Supp. 838.

The liability of the gas company is not affected by the fact that the plaintiff is not its patron. Palmer v. Chester County Gas Co., 49 Pa. Super. Ct. 572.

Such a liability is not determined by the doctrine of insurance of safety, but by the principle of negligence applicable to authorized public works. Gould v. Winona Gas Co., *supra*.

For an instance where the fumes from a smelter killed timber, see Johnson v. Northport, etc., Co., *supra*.

[122] Wichita Gas, etc., Co. v. Wright, 9 Kan. App. 730; 59 Pac. Rep. 1085.

[123] Evans v. Keystone Gas Co., 148 N. Y. 112; 42 N. E. Rep. 513; 30 L. R. A. 651; 51 Am. St. Rep. 681; affirming 72 Hun. 503; 25 N. Y. Supp. 191; 28 Chic. L. News 160. See Rauck v. Cedar Rapids Gas Co., 116 Iowa 11; 89 N. W. Rep. 88.

[124] Rockford Gaslight and Coke Co. v. Ernst, 68 Ill. App. 300.

[125] Butcher v. Providence Gas Co., 12 R. I. 149; 34 Am. Rep. 626; Armbruster v. Auburn Gaslight Co., 18 N. Y. App. Div. 447; 46 N. Y. Supp. 158; Siebrecht v. East River Gas Co., 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; Dow v. Winnipesaukee Gas Co., 69 N. H. 312; 41 Atl. Rep. 288; 42 L. R. A. 569. See Denniston v. Philadelphia Co., 1 Super. (Pa.) Ct. 599; 38 W. N.

§ 713. Illuminating gas driving sewer gas into house.

If illuminating or natural gas is negligently permitted to escape into a sewer in such a quantity as to shove or drive sewer gas in the sewer into a house, and such sewer gas injure the inmates thereof, the gas company will be liable, although no illuminating or natural gas has ever entered such house; and the same would be true, of course, if such illuminating or natural gas did enter the house, but carried with it other gas that produced the damage.[126]

§ 714. Explosion caused by act of third person.

The circumstances may be such that the company will be liable although the explosion is occasioned by the negligent act of a third person.[127] Thus where the servants of a city injured oil pipes and the leaking oil found its way to a sewer, and thence to a canal which flowed under a mill and was there exploded, to plaintiff's injury, the oil company was held liable.[128] So where gas escaped from a pipe which the company was bound to keep in repair, and a servant of a third person negligently set the gas, which had accumulated in his master's building, on fire, and the fire spread to the plaintiff's building, the company was held liable.[129] So where the plaintiff employed a gasfitter to place pipes in position in his house and connect them with the meter, whose servant went in search of escaping gas with a lighted candle, using the candle negligently, it was held that he could recover; and that it could not be said he had contrib-

C. 332; 27 Pittsb. L. J. N. S. 14.

If other causes also operated to injure or kill the trees, the damages must be restricted to the injury the defendant did. Rauck v. Cedar Rapids Gas Co., 116 Iowa 11; 89 N. W. Rep. 88.

Evidence of leakage of the main 1,000 feet away is inadmissible. Fullerton v. Glen Falls, etc., Co., 122 N. Y. Supp. 995.

[126] Hunt v. Lowell Gaslight Co., 8 Allen 169; 85 Am. Dec. 697.

[127] Aurora Gaslight Co. v. Bishop, 81 Ill. App. 493; Moore v. Lanier, 52 Fla. 353; 42 So. Rep. 462; Watson v. Kentucky, etc., Co., 137 Ky. 619; 126 S. W. Rep. 146; 129 S. W. 341.

[128] Lee v. Vacuum Oil Co., 54 Hun 156; 7 N. Y. Supp. 426.

[129] Pine Bluff, etc., Co. v. McCain, 62 Ark. 118; 34 S. W. Rep. 549; Lebanon, etc., Co. v. Leap, 139 Ind. 443; 39 N. E. Rep. 57; McKenna v. Citizens' Nat. Gas Co., 198 Pa. 31; 47 Atl. Rep. 990.

uted to the injury, for he had no control over the servant.[130] And, as has been elsewhere discussed, the gas company is not excused where its mains are injured by a third person, so that gas escape, if it had notice of the injury and failed to promptly stop the flow of gas.[131] In a case where a city engineer was superintending the construction of a sewer, and a gas main was so injured that gas escaped, entered a sewer, and the engineer, knowing the presence of gas in the sewer, entered it with a light which ignited the gas; it was held that the failure of the gas company to repair the pipe was the proximate and not the remote cause of the injury, and that the gas company was liable. "The calamity," said the court, "resulted from the defendant's negligence, and but for the defective pipe there would have been no escape of gas; and if this was not the proximate cause, where, we ask, was the intervening one by which the consequences of the accident are to be shifted from the defendant to some other person or thing?"[132] In another instance the owner of a house notified a gas company to shut off his supply of gas, as he desired to discontinue its use. The company sent its servant to cut off the gas at the property line and take out the meter. The servant cut off the supply by means of a key nearly four feet in length, which he inserted in the gas box at the property line, and then went into the house and removed the meter, leaving the end of the supply pipe open. When he turned off the gas the servant left the key in the gas box, and did not remove it until after he had removed the meter and returned to the street. After leaving the house and before he reached the key again, some one, without his knowledge, turned on the gas by use of the key. Not more than ten minutes had intervened. The wife of the owner of the house, perceiving there was gas in the basement, went and opened

[130] Burrows v. March Gas and Coke Co., L. R. 7 Exch. 96; 41 L. J. Exch. 46; 26 L. T. 318; 20 W. R. 493.

See where a thief with a candle caused an explosion, and the company was held liable. Griffiths v. City of London Gas Co., 16 Gas J. 139.

[131] Smith v. Boston Gaslight Co., 129 Mass. 318; Koelsch v. Philadelphia Co., 152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653.

[132] Oil City Gas Co. v. Robinson, 99 Pa. St. 1; 13 Repr. 253.

the cellar door to let in air; and as it was night, she took a lamp to enter the cellar. As soon as she opened the door an explosion followed, injuring her severely. At the time of the explosion the gas was not turned off; and the gas company claimed it was not liable, because it had done its work properly, and the gas had been turned on by a stranger without its knowledge. But the court held that the company was liable, on the theory that it was an act of negligence in the servant to leave the key in the gas box where any busy meddler could turn it on. Having undertaken to turn off the gas, it should do so thoroughly; and it was immaterial that some third person turned it on in the manner described.[133] So where it was charged that the father, who was the owner of the house, injured the pipe, causing the gas to escape; and upon his request the gas company sent its servant to fix the pipe and prevent the escape of the gas, and he carelessly carried a light into the cellar where the gas was escaping, igniting the gas and injuring the father's child, it was held that the child could recover, the father's neglect being the remote cause.[134] And where a gas company ought to have foreseen that the construction of underground works in the street would probably injure its pipes, of which work the company had knowledge, and it failed to furnish an inspector; it was held liable where the explosion producing the injury was occasioned by the act of a stranger to it, that it was liable because of its neglect to inspect.[135] But where the owner of a private gas plant supplied a hotel with gas and the pipe leading to the hotel became so stopped or clogged that gas would not flow through it, and the person who had constructed the plant, but not then in the owner's service, advised the superintendent of the hotel owner to take the weight out of the gasometer, and the superintendent followed the suggestion, and thereupon the gasometer turned over so as to permit gas to escape, causing an explosion; it was held that the owner of the

[133] Louisville Gas Co. v. Gutenkuntz, 82 Ky. 432.

[134] Lannen v. Albany Gaslight Co., 44 N. Y. 459.

If the father had brought the suit to recover for loss of services, another question would have been presented.

[135] Koplan v. Boston Gaslight Co., 177 Mass. 15; 58 N. E. Rep. 183.

gas plant was not liable; for the proximate cause of the injury was the experiment made by the superintendent, there being no evidence that the owner employed incompetent workmen to put up the plant. It was considered that the clogging of the pipe had no connection with the accident, except as it led to the experiment.[136] Where a gas company's pipes were not connected with a building until the owner or lessee applied for gas, being required to furnish a plan of the pipes in the building, and as soon as an application was made and plans furnished it would deliver a meter, leaving the applicant to make the connection, without itself making an examination; and the lessee of a storeroom, on receiving a meter, employed a plumber to make a connection with the company's supply pipe; and from a pipe running into an apartment above the store, occupied by other tenants, gas escaped, killing the plaintiff's intestate; it was held that it was a question for the jury whether the gas company had used reasonable precautions.[137] In a Massachusetts case it was said: "If the ignition of the gas by a natural cause, or by some other person, ought to have been foreseen as a probability, the defendant is liable."[138]

§ 715. Gasfitter igniting escaping gas.

A gas company may become liable to the owner of property injured by the explosion of escaping gas, even though it was ignited by the carelessness of a plumber or his servant employed to repair or change the plumbing in the house. Thus

[136] Taylor v. Baldwin, 78 Cal. 517; 21 Pac. Rep. 124.

By permitting a consumer to employ a plumber to put in a gas pipe and turn on the gas, a gas company does not make such plumber its agent, so as to render it liable for an explosion caused by the plumber's negligence. Flint v. Glouster Gaslight Co., 3 Allen 343.

[137] Scheemer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653; reversing 26 N. Y. Supp. 1128; 65 Hun 378, and 20 N. Y. Supp. 168.

[138] Koplan v. Boston Gaslight Co., *supra;* Hampton v. Cradley Heath Gas Co., 14 Gas J. 606.

Merely because gas also escaped and accumulated in the same place the defendant's had when it exploded is not a defense. Luengene v. Consumers' L. H. & P. Co., 86 Kan. 866; 122 Pac. 1032.

A contractor paving a street who negligently disturbs the gas mains, whereby the gas escapes, an explosion follows, and a passerby is injured, will be liable. Fellwood v. Pearson, 23 Gas J. 248.

where a gas company put in a defective supply pipe between its mains and the meter on plaintiff's premises, whereby gas escaped into the building; and a workman in the employ of a gasfitter, called by the plaintiff to put in pipes leading from the meter to the burners, negligently took a lighted candle for the purpose of finding out whence the gas proceeded; whereupon an explosion followed by reason of the contact of the gas with the candle flame, it was held that the plaintiff could recover damages for the injury to his house occasioned by the explosion, that the damages were not too remote, and that it could not be considered that the plaintiff contributed to the injury, for the workman was not under his control.[139] And in a New York case, where the pipe was broken by frost in consequence of its having been laid, by the defendant, too near the surface of the ground, from which gas escaped into the cellar, it was held that the plaintiff could recover damages caused by an explosion occasioned by a plumber, whom he had called to ascertain where the leak was, opening the cellar door, holding in his hand a lighted candle; and it made no difference that the plumber may have been guilty of negligence, for he was not the agent of the plaintiff so as to make the latter answerable for his negligence, for where a person sustains an injury from the separate negligence of two persons employed to do two separate things, he may maintain an action against both or either.[140] Where it was claimed by the defendant that the leak occasioned by the city officers not properly packing the earth under the pipe that broke in building a sewer, it was said that "the defendants, in managing a dangerous element, were bound not only to use due care on the part of themselves and their servants, but also to use due care to prevent injury from the careless or wrongful meddling with their works on the part of others; that they could not interfere with or prevent the city from building a sewer, but they had a right to and were bound to see that, in restoring the earth to its place, their own pipes were properly supported, and, if injured, to see that the injury was repaired as soon as it could reasonably be done;" and that

[139] Burrows v. March Gas Co., L. R. 7 Exch. 96; L. R. 5 Exch. 67; 41 L. J. Exch. 46; 26 L. T. 318; 20 W. R. 493; Mersey Docks and Harbor Board v. Liverpool, etc., Co., 26 Gas J. 327.

[140] Schermerhorn v. Metropolitan Gaslight Co., 5 Daly 144.

whether the defendant had exercised due care in these particulars was a question for the jury.[141]

§ 716. Negligence of fellow servant.

The rule in negligence cases with regard to fellow servants applies to gas explosions or leaks. Thus if a servant of a gas company, who was a fellow servant with the plaintiff, cause the explosion, there can be no recovery.[142] In the case just cited there was really no negligence on the part of the company, for it had used proper appliances; but the explosion was occasioned by the act of a fellow servant in carelessly lighting a match near the escaping gas. The same rule was announced in a case where a fellow servant caused an explosion in a mine.[143] Where an employee of a gas company, under the direction of the company's superintendent, went into a trench to repair a leak in a gas main; and the superintendent approached with a lighted lantern, and the escaping gas ignited, causing an explosion; it was held that the action of the superintendent in approaching the trench with the lighted lantern was the proximate cause of the injury, and that under a statute providing that where the injury resulted from the negligence of any person in the service of a corporation to whose order or direction the injured employee at the time of the injury was bound to conform and did conform, the company was liable, the plaintiff could recover.[144] A similar result was reached where no statute seemed

[141] Butcher v. Providence Gas Co., 12 R. I. 149; 34 Am. Rep. 626.

A gas company is not liable when the injury is occasioned wholly by the neglect of a gasfitter, called by the property owner. German-American Ins. Co. v. Standard Gaslight Co., 67 N. Y. App. Div. 539; 73 N. Y. Supp. 973.

If the explosion is occasioned by the superintendent of the company in searching for a leak with a light, the company will be liable. Tipton Light, etc., Co. v. Newcomer (Ind. App.), 67 N. E. Rep. 548.

[142] Allegheny Heating Co. v. Rohan, 118 Pa. St. 223; 11 Atl. Rep. 789; Warren v. Wilder, 20 Gas J. 892.

[143] Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432.

[144] Indianapolis Gas Co. v. Shumack, 23 Ind. App. 87; 54 N. E. Rep. 414; Adams v. Iten Biscuit Co. (Okl.), 162 Pac. 938.

Where a *watchman* employed to patrol a street being excavated for the laying of mains and to report any escape of gas, and he was notified of the odor of escaping gas, but made no report to his company, and nine hours after he was notified

to control it.[145] And in a case, not strictly in line with the subject matter of this section, where the action was against a chemical company for injuries sustained in inhaling fumes of nitric acid, the fact that the complaining person left his work, saying he could not endure it, and thereupon the superintendent assured him they would not hurt him, it was held that it was not shown that the employee so injured knew or had reason to know the fumes would do him a permanent injury, and that it was not negligence for him to return to work.[146]

§ 717. Person on premises by license.

A gas company not only owes a duty to the owner of the premises and the inmates thereof, but also to all who are rightfully upon or rightfully come upon the premises, or who come there with the express or implied permission of the owner. This will include not only the servants of the owner, but all the servants of a contractor repairing or working upon the premises, all persons employed, whether by the day or by the piece, to work thereon or sent there by another to do work.[147] The rule is broad enough to include a guest of the owner of the premises.[148] The negligence of the owner in causing the ex-

an explosion took place injuring a workman of the company, it was held that the company was liable. Diehle v. United Gas Imp. Co., 225 Pa. 494; 74 Atl. Rep. 349.

[145] Citizens' Gaslight and Heating Co. v. O'Brien, 15 Ill. App. 400; affirmed 118 Ill. 174; Citizens' Gaslight and Heating Co. v. O'Brien, 19 Ill. App. 231; affirmed in Citizens' Gaslight and Heating Co. v. O'Brien, 118 Ill. 174; 8 N. E. Rep. 310.

[146] Wagner v. Brew Chemical Co., 147 Pa. St. 475; 29 W. N. C. 490; 23 Atl. Rep. 722, distinguishing Beittenmiller v. Bergner, etc., Co. (Pa.), 12 Atl. Rep. 599.

For a case where a servant of one company working for another company did not involve the relation of fellow servant, see Hatfield v. St. John Gaslight Co., 32 N. B. 100.

An employee, who is injured by reason of an explosion of a dangerous substance negligently placed on the land of his employer by another person, in an action against such person for his injuries is not barred from recovery by the fact that negligence on the part of his employer contributed to his injury. Leahy v. Standard Oil Co., 224 Mass. Rep. 353; 119 N. E. 950.

[147] Washington Gaslight Co. v. Eckhoff, 22 Wash. L. Rep. 656; 4 App. D. C. 174.

[148] Defiance Water Co. v. Olinger, 54 Ohio St. 532; 35 Ohio L. J. 323, 350; 44 N. E. Rep. 238; 32 L. R. A. 736. See note 150 of this section.

plosion, where the gas company has also been negligent, will not defeat such person's right to recover, even though their combined negligence was required to cause an explosion.[149] But where a carpenter in search of employment, entered a building while the defendants were inspecting the gas pipes, and was injured by an explosion, it was held that he could not recover of the defendants as he was a mere licensee to whom the defendants owed only the duty to abstain from inflicting a wanton injury.[149a]

§ 718. Guest or inmate of family may recover from gas company where owner is negligent.

A person making one of a family may recover for personal injuries occasioned by an explosion in the house, and is not chargeable with the negligence of the head of the family or owner of the dwelling, or of any member of the family with respect to the danger of gas escaping into the dwelling house.[150]

§ 719. Lessee's right of action against the gas company.

The lessee or tenant has a right of action against the gas company for negligently permitting gas to escape upon the leased premises and injuring his possessory interest—as befouling a well—while the landlord must bring the action for any injury the reversion may sustain. If the act of the gas company made the enjoyment of the estate less beneficial, or in any way rendered it more expensive or inconvenient, without fault on his part, he is entitled to such damages as he has thus suffered.[151]

[149] Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 385; 18 L. R. A. 215; affirming 41 Ill. App. 34; Richmond Gas Co. v. Baker, 146 Ind. 600; 45 N. E. Rep. 1049; 36 L. R. A. 683; McGahan v. Indianapolis, etc., Co., 140 Ind. 335; 37 N. E. Rep. 601; 29 L. R. A. 355 (a plumber).

[149a] Schiffer v. W. N. Sauer Co., 238 Pa. 550; 86 Atl. 479.

[150] Richmond Gas Co. v. Baker, 146 Ind. 600; 45 N. E. Rep. 1049; 36 L. R. A. 683. See case cited in note 148 of this section.

[151] Sherman v. Fall River Iron Works Co., 2 Allen 524.

The failure of the lessee to recover a judgment is no bar to the lessor recovering a judgment for an injury to his interest in the property—the action not being between

§ 720. Third person causing gas to escape, liability.

If a third person—one not connected with a gas company, and for whose act it is not liable—negligently cause gas to escape to the injury of a person, he will be liable to such person for all damages sustained. And where a municipality in constructing a sewer did the work in such a negligent manner as to cause the gas pipe to break for lack of support, whereby gas escaped into the plaintiff's house so as to cause an explosion, the municipality was held liable, and could not escape liability by delegating the construction of the sewer to a contractor.[152] A natural gas company furnished a mill with gas. The pipes were arranged so that gas passed through a "regulator," which reduced the pressure before it reached the meter. There was a pipe, called a "by-pass," through which gas could be turned into the meter at the full pressure of the main. The owner had control of both the cock used to turn on the gas through the "regulator" and the one to turn it on through the "by-pass." The plaintiff entered the mill to seek work, and as he was leaving the mill owner, in turning on the gas, accidentally turned the cock admitting the full pressure. The result was that the meter exploded, injuring the plaintiff. It was held that the gas company was not liable, for the only negligence was that of the mill owner.[153]

§ 721. Gas turned on by owner or stranger.

If the owner of the property or a stranger turn on the gas at the property line the gas company will not be liable to such owner for injuries occasioned by an explosion of the gas, thus turned on, occurring upon such property. The gas company has a right to control the turning on of gas; the stop-cock at the property line is its own property, and under its control. The

the same parties nor between their privies. Bartlett v. Boston Gaslight Co., 122 Mass. 209.

Of course, for an injury to the person, the question of tenancy is not involved, though the injury occurs in the house the plaintiff has leased. Otterback v. Philadelphia, 161 Pa. St. 111; 28 Atl. Rep. 991.

[152] Hardaker v. Idle Dist. Council [1896], 1 Q. B. 335; 65 L. J. Q. B. (N. S.) 363; 74 Law T. Rep. 69; 44 W. R. 323; 60 J. P. 196.

[153] Triple State, etc., Gas Co. v. Wellman, 114 Ky. 79, 70 S. W. Rep. 49; 24 Ky. L. Rep. 851.

mere fact that the gas company did not object to the gasfitter putting pipes in a building for the owner to turn on the gas at the property line will not make it liable to such owner for an injury occasioned by an explosion occurring in the building because of the defective piping or failure to close up pipe ends. And there are two reasons for this: first, the gas company has no control over the piping within the building; and, second, the gas fitter is not its agent.[154] Nor is the gas company liable, although it otherwise would have been, for the act of a former employee turning on the gas, where the consumer requesting it to be turned on knew he was not then in the company's employ; and the fact that such person may have turned on the gas for other persons, in which the gas company acquiesced, does not make it liable, where the consumer knew he was not its employee.[155] Where a natural gas company had high and low pressure mains, controlled by valves securely enclosed in a box; and an employee of another natural gas company, desiring to take water out of the pipes of his company, opened the gas box by mistake and turned on the gas from the high pressure main to the low pressure main; and the gas, thus turned on, flowed into the pipes of a house supplied from such low pressure main, and bursted the gas fixtures, causing a fire and damages to the house; the gas company whose valves he had thus turned was held not liable, for its act had not caused the injury, and it had taken proper precautions to protect its valves from intermeddling. But the gas company whose employee had thus inadvertently turned the valves was held liable, although at the time he did so there was little gas in the high pressure main, it having been turned off to make needed repairs; and the fact that the company owning the mains may have been negligent in withdrawing the gas, or that the meter and regulators were out of order, was held to be no defense; for neither company could escape if the concurring negligence of both of them, if such was the case, produced the result.[156] But where the owner of a building requested the gas company to cut off his gas and remove its meter; and the company sent its employee, who cut off

[154] Flint v. Gloucester Gas and Light Co., 3 Allen 343.

[155] Flint v. Gloucester Gas and Light Co., 9 Allen 552.

[156] McKenna v. Bridge Water Gas Co., 193 Pa. St. 633; 45 Atl. Rep. 52; 47 L. R. A. 790.

the gas at the street curbing with a key several feet long which he inserted in the gas box for that purpose and left there while he went into the house to remove the meter; and after he had removed the meter and before he reached the gas box—a period of only a few minutes—some unknown meddlesome person turned on the gas again, of which fact the employee was ignorant; and shortly thereafter an injury was occasioned by the gas escaping from the end of the service pipe extending into the cellar, it was held that the gas company was liable for the act of the stranger, because of the fact of the employee's negligence in leaving the key in the position he did.[157]

§ 722. Landlord's right of action against tenant.

There is no doubt that if a tenant carelessly or negligently cause an explosion of escaping gas in the house he is occupying, although he in no way caused the gas to escape, he would be liable to his landlord for the damages the house sustained; and much more so would he be liable if he caused the gas to escape.

§ 723. Tenant's right of action against landlord.

A tenant may have a cause of action against his landlord, where he has suffered a damage from escaping gas by reason of the latter's negligence. Thus where a landlord had the meter removed from the house, and the fixtures from the gas pipe, by a gas man, who left one of the pipes open and uncovered in an upper room, which was afterwards let to and occupied by his tenant; and the landlord subsequently gave the tenant of the lower floor permission to introduce gas into the house, which he did, without notifying the other tenant; and the gas pipes in the first tenant's apartment had been left open, by reason of which the room filled with gas, and when she entered the room with a candle an explosion occurred, injuring her greatly; it was held

[157] Louisville Gas Co. v. Gutenkuntz, 82 Ky. 432. The question of neglect to close the end of the pipe does not seem to have controlled the case.

If a tenant turns on the gas, and it damages the building, the landlord cannot recover damages for the injury from the gas company. Creel v. Charleston, etc., Gas Co., 51 W. Va. 129; 41 S. E. Rep. 174.

that the landlord was guilty of negligence, even though the direct cause of the accident was the negligence of the gas man in not having sufficiently closed the fixtures.[158] But a landlord is not liable to an employee of his tenant for an injury resulting from an explosion of gas, caused by defective plumbing done by a former tenant of the building, who employed a competent plumber to do the work, in which the defects were not apparent and of which such landlord had no actual knowledge.[159]

§ 724. Owner of premises liable to injured person.

The owner of the premises may himself be so guilty of negligence as to be liable to anyone rightfully upon them who is injured by an explosion. Thus if gas be escaping in a dangerous quantity, and he knowing of the escaping gas and the extent of it, invite another on the premises, and does not warn him, and an explosion occurs whereby the person so invited is injured, such owner will be liable if he negligently caused the explosion. Where a servant of a water company went upon certain premises, in discharging his duty, to ascertain from a water meter the amount of water used by the owner of the premises, and was

[158] Kimmel v. Burfeind, 2 Daly 155. The question of the plaintiff's due care was not considered.

Where the tenant has sued the gas company for an injury to his leasehold, and failed to recover judgment upon the merits of the case, such judgment is not a bar to the landlord recovering for an injury to his reversionary interest, the action not being between the same parties nor their privies. Bartlett v. Boston Gaslight Co., 122 Mass. 209.

A landlord's liability to his tenant for leaving premises in the unsafe condition created by a gas company's negligence does not relieve the company from a liability. City Gas Co. v. Lawrence, 118 Va. 557; 88 S. E. 73.

[159] Metzger v. Shultz, 16 Ind. App. 454; 43 N. E. Rep. 886, rehearing denied, 45 N. E. Rep. 619.

Where a landlord engaged a plumber to disconnect a gas fixture and to connect the same with the tenant's meter, and the plumber without notice or warning left the pipe uncapped, so that the gas escaped, the landlord was liable for injuries to an employe of the tenant from an explosion which resulted when such employe, without knowledge of the danger, entering the room, which was dark, and lighting a match. Dicker v. Rossin, 136 N. Y. Supp. 50.

For an explosion of gas in apartments where a gas company was held liable, see Christo v. Macon Gas Co. (Ga. App.), 91 S. E. 1007; first appeal 18 Ga. App. 454; 89 S. E. 532.

killed by an explosion of gas that had escaped, the owner of such premises was held liable; for the person killed was rightfully on the premises, being more than a licensee, under an implied invitation of the owner. The mere fact that the deceased smelled gas was considered not to be such contributory negligence on his part as should necessarily defeat him; for he was acting under the stress of a duty.[160]

§ 725. Plaintiff must show due care on his part.—Contributory negligence.

The burden rests upon the plaintiff to show that he was acting with due care and with ordinary prudence when the accident occurred; or in other words, his act did not contribute to the injury. Ordinary care is all that is required of him; but, of course, what is ordinary care will depend upon the amount of danger and the extent of the plaintiff's knowledge of the danger.[161] One has no right to expose himself to the mischievous effect of gas, and if injured, hold the gas company liable; and the burden rests upon him to show that he did not do so.[162] If the plaintiff, by the exercise of diligence, could have prevented the injury, he cannot recover; and if the injury was a continuing one, and the company could have stopped the continuation of the loss if it had been notified of it, he cannot recover for any loss sustained after it became his duty to notify the company of such continuation, his act being considered as contributing to the loss sustained after the duty of informing the company has

[160] Finegan v. Fall River Gas Works, 159 Mass. 311; 34 N. E. Rep. 523.

[161] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233; Lee v. Troy Citizens' Gaslight Co., 98 N. Y. 115; Bartlett v. Boston Gaslight Co., 117 Mass. 533; 19 Am. Rep. 421; Schmeer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653; German-American Ins. Co. v. Standard Gaslight Co., 67 N. Y. App. Div. 539; 73 N. E. Supp. 973. That is, where some statute does not change the rule as to the burden of showing contributory negligence. The burden is upon the gas company to show that the injured person by his negligence contributed to the ignition of the gas. Bradley v. Shreveport Gas Co., 142 La. —; 76 So. 230.

[162] Holly v. Boston Gaslight Co., *supra;* Hamma v. Haverhill Gaslight Co., 203 Mass. 572; 89 N. E. Rep. 1043. Of course, this is not true so far as the "burden" is concerned in those jurisdictions where the burden is on the defendant to show contributory negligence.

been imposed upon him.[163] Where the plaintiff's house was supplied with gas, but another company had a gas main ninety feet away from which gas escaped, which passing under the ground entered her cellar, and there exploded; and although plaintiff supposed the gas she detected was from the company's pipes that supplied her with gas, though she knew of the gas leak in the other company's main, yet it was held that she was not guilty of such contributory negligence as would defeat a recovery.[164] "The leak was across the street from appellee," said the court. "She did not receive her gas from the appellant. It is hard, therefore, to understand how she should have thought that the leak at appellant's sleeve, ninety feet distant, even if she knew its existence, which does not appear from the evidence, could have been the source of any danger to her." Where the suit was to recover for injuries incurred from escaping gas, the plaintiff, to establish due care on his part, it was held could not prove that the gas company's agent advised the occupants of a neighboring house, into which the gas had escaped from the same leak, what to do to avoid the ill consequences from it, and that he did the same things thus advised, if such agents gave him directions respecting the matter.[165]

[163] Hunt v. Lowell Gaslight Co., 1 Allen 343.

[164] Consumers' Gas Co. v. Perrego, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146.

Where gas was leaking into the plaintiff's cellar from a gas pipe, and the company's superintendent came to locate the leak, and plaintiff went into the cellar at his request, but remained no longer than was necessary to point out the place of the supposed leak, and, without warning her, the superintendent lighted a match, causing an explosion, it was held that the plaintiff was not guilty of negligence contributing to the explosion. Tipton Light, etc., Co. v. Newcomer (Ind. App.), 67 N. E. Rep. 548.

[165] Emerson v. Lowell Gaslight Co., 3 Allen 410.

Defendant was engaged in manufacturing calcium carbide, a product which generated a highly explosive gas when brought into contact with water, and its foreman directed a plumber in its employment to repair certain water pipes near an elevator pit, at the bottom of which was stored a quantity of carbide. When the plumber took apart the pipe to make the repairs, the water therein run out and into the elevator pit, and came in contact with the carbide at the bottom, causing an explosion, by which plaintiff's intestate was killed. The water in the pipe could easily have been discovered and drained, but no effort was made to do so, and the plumber was not cautioned against permitting the water to run out on the floor. It was held that deceased did not as-

§ 726. Owner removing from his premises.

The circumstances may be such as to require the owner or occupants of a house to vacate it in order to avoid injury to himself; and if he do not he will be guilty of such contributory negligence as will bar a recovery. Thus where the plaintiff's health was injured by inhaling gas escaping from a defective main in the street and entering his dwelling house, it was held to be a want of due care on his part to remain in the house, after he had a reasonable opportunity to procure another house or place of residence and to remove thither; and that the gas company could not properly be held liable in damages for consequences which ensued after such removal might have been made.[166] So where the plaintiff was a minor living with his father, and was injured by inhaling gas at night, which had escaped from a street main during the day previous, and of which the gas company was not notified until the afternoon, it was held that the plaintiff could not maintain his action if his father failed to adopt suitable precaution against the hurtful effect of the gas after it was discovered to be filling the house; and that it was for the jury to decide whether there was not a manifest want of prudence in remaining in the house after it became known to the inmates that it was being filled with gas.[167] Where a strong smell of gas prevailed throughout the dwelling house, and the gas company sent its servant to repair the leak, who, after professing that he had made the necessary repairs, informed the family that all was safe, and assured them that the odor of gas came from a gas post in the street, it was held not negligence on their part for the members of the family to

sume the risk of injury by an explosion caused in such a manner, since it was not an ordinary risk which the employees of other departments assumed. Charron v. Union Carbide Co., 151 Mich. 687; 115 N. W. 718.

Not every exposure of one's self to escaping gas will prevent a recovery. A recovery was allowed, in one case, where gas had been escaping for several months, the occupant not having been familiar with the use of gas nor aware of the danger of an explosion. Louisville Gas Co. v. Fry, 147 Ky. 754; 145 S. W. 748.

Contributory negligence is a question for the jury, as a rule. Rock Oil Co. v. Brumbaugh, 59 Ind. App. 640; 108 N. E. 260.

[166] Hunt v. Lowell Gaslight Co., 1 Allen 343.

[167] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233.

remain in the house after receiving such assurance.[168] Of course, the rule is not so stringent as to require the occupant to leave the house as soon as he smells the escaping gas, for the odor may be slight, although unusual. But even though the amount be small, yet it may so accumulate as to render it dangerous, either by reason of an injury inflicted upon him by an explosion or to his health, to remain in the house; or the gas may escape in such volume as to require immediate action on his part. But he is not bound to remove before making a timely effort to stop the flow of escaping gas or to have the gas company stop it; unless it is clear, or there is a strong presumption, that it would be dangerous to remain longer in the house.[169] Of course, the removal here discussed is a removal of the person and not of his goods; for he is not bound to risk his health in removing them, and there is not, usually, much likelihood that they will be injured.[169a]

§ 727. Duty of property owner to cut off supply of gas.

The owner of the property must cut off the gas when discontinuing the supply, where the means of cutting it off is on his own premises, or at least within his buildings; and the gas company is under no duty to enter the building and cut off the gas in order that explosions may be prevented. Thus where the stop-cock was within the house, situated between the inner wall and the meter; and the last tenant, on removing, gave the usual notice that he did not require any further supply; and one of the gas company's workingmen, at the tenant's request, removed the chandelier from one of the rooms, leaving the end of the pipe properly secured, the internal fittings being the

[168] Richmond Gas Co. v. Baker, 146 Ind. 600; 45 N. E. Rep. 1049; 36 L. R. A. 683.

For a case where it was held in an action to recover for injuries from escaping gas that the fact plaintiff returned to the house, notwithstanding the strong odor of gas did not require a finding that as a matter of law she was guilty of contributory negligence, see Solier v. Fall River Gas Works Co., 224 Mass. 53; 112 N. E. 627.

[169] Kibele v. Philadelphia, 105 Pa. St. 41.

[169a] It has been held whether or not it is contributory negligence to remain in a house in which gas is escaping is a question for the jury. Richmond v. Gay, 103 Va. 320; 49 S. E. Rep. 482.

property of the owner of the house; and while the house remained untenanted, the gas by some unexplained means escaped, an explosion occurred, and the house was injured; it was held that the company could not be held liable on the theory that it was its duty to cut off the supply of gas, but the property owner was guilty of contributory negligence for not having turned the stop-cock so as to shut off the flow of gas.[170] In another instance where the consumer was informed that the employee who had turned on the gas was not authorized to do so, that it was the duty of another employee to turn it on, that there was a leak in the regulators, and that it could not attend to the leak before the next morning, it was held that the failure of the consumer to turn off the gas on receiving this information of the defect was such negligence as precluded a recovery.[171]

§ 728. Searching for leaks with a light.

Courts will not say as a matter of law that it is contributory negligence to search for leaking gas with a lighted candle or by the use of matches. It is not negligence *per se* to thus search for escaping gas.[172] Nor is taking a lighted lamp into a cellar filled with gas an act of contributory negligence, as a matter of law, which will preclude a recovery for injuries occurring ten minutes later, although the person injured knew at the time he took the light into the cellar that it was filled with gas.[173] In such instances the question of contributory negligence in thus searching for escaping gas is one for the jury.[174] And where

[170] Holden v. Liverpool Gas Co., 3 C. B. 1; 15 L. J. C. P. 301; 10 Jur. 883.

[171] Kohler Brick Co. v. N. W. Ohio, etc., Gas Co., 11 Ohio Cir. Ct. 319; 5 Ohio Cir. Dec. 379.

[172] Pine Bluff, etc., Co. v. Schneider, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366; People's Gaslight and Coke Co. v. Amphlett, 93 Ill. App. 194; City Gas Co. v. Webb, 117 Va. 269; 84 S. E. 645; Mohosted v. Ideal Lighting Co., 273 Ill. 154; 110 N. E. 795; affirming 193 Ill. App. 91.

[173] Consolidated Gas Co. v. Crocker, 82 Md. 113; 33 Atl. Rep. 423; 31 L. R. A. 785.

[174] Scheemer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653; Pine Bluff, etc., Co. v. Schneider, *supra;* German-American Ins. Co. v. Standard Gaslight Co., 67 N. Y. App. Div. 539; 73 N. Y. Supp. 973; Oliver Stove Works v. Ft. Pitt Gas Co., 210 Pa. 141; 59 Atl. Rep. 819; Bandler v. People's G. & C. Co., 108 Ill. App. 187; People's G. & C. Co. v. Amphlett, 93 Ill. App. 194; Kibele v. Philadel-

the tenant of the plaintiff having smelt escaping gas, which he reasonably supposed proceeded from the furnace, and under that impression went with a lighted candle into the cellar to examine such furnace, it was held that there was not such contributory negligence as prevented a recovery for the damages occasioned by an explosion, the candle having come in contact with gas escaping from the defendant's pipe.[175] "The other ground of defense, as to the contributory negligence of the plaintiff's intestate," said the court in one case, "we do not think should be taken from the jury. Sometimes it is extremely dangerous to take a light to discover the location of a gas leak, and sometimes it is not, depending upon various circumstances; among others, upon the extent of the leak, the size of the enclosure where located, and the length of time the leak has existed. The plaintiff's intestate, a boy of 18, took a candle, with the statement that he had seen gas men take a candle to find a leak, and it is a fact that they do so upon some occasions. The whole case as to the contributory negligence of plaintiff's intestate should be submitted to the proper judges of fact."[176] Searching for leaking gas with a lighted taper, by the house owner who discovers the escape of gas after a plumber employed to put in gas fixtures has left, is not contributory negligence *per se,* but whether or not there is such negligence is a question for the jury.[177] If the gas is escaping in large quantities, the court may possibly say that it was contributory negligence to search for the leak with a lighted taper.[178] If the owner of the premises employ a plumber, the act of the plumber in entering a cellar with a lighted candle to locate a leak does not prevent

phia, 105 Pa. St. 41; Ottersbach v. Philadelphia, 161 Pa. 111; 28 Atl. Rep. 991; Stoner v. Pennsylvania, etc., Co., 40 Pa. Super. Ct. Rep. 599.

[175] Bartlett v. Boston Gaslight Co., 122 Mass. 209.

[176] Scheemer v. Gaslight Co., *supra;* City Gas Co. v. Webb, 117 Va. 269; 84 S. E. 645.

[177] Plouk v. Jessop, 178 Pa. St. 71; 27 Pittsb. L. J. (N. S.) 162; 39 W. N. C. 156; 35 Atl. Rep. 851. In this case the plaintiff noticed leaking gas, but the plumber assured him that "everything is right"; and after he had left, the plaintiff, still noticing it, took a lighted candle and searched for it, as he had seen the plumber do it. Mohosted v. Ideal Lighting Co., 271 Ill. 154; 110 N. E. 795; affirming 193 Ill. App. 91.

[178] Pine Bluff, etc., Co. v. Schneider, *supra.*

such owner recovering damages occasioned by an explosion.[179] Where an inspector of water meters went to a shed to examine a water meter therein on the gaslight company's premises, and was assured by the company's officers, who were present, that there was no danger, although he detected gas that had escaped, and demonstrated the fact by lighting matches themselves; it was held that he was not precluded from recovering damages on the ground of contributory negligence, although he apprehended danger when making the examination. The act of the officers of the gas company had lulled his suspicions; and he had a right to rely upon their statements.[180] So where a laborer was ordered by his superior to enter a still and repair it, and was killed by an explosion of gas which had entered for lack of a stop-cock, and which was ignited by a lighted candle he was carrying, it was held that the company was liable, although it was almost absolutely certain that gas from the other stills nearby in use would turn back into the empty still, in the absence of a stop-cock. It was said that he did not assume the risk; for he had a right to rely upon the duty of the master to furnish him a reasonably safe place within which to work.[181] But to take a lighted candle to a place where it is known that gas in a considerable quantity is escaping, is such an act of negligence as will prevent a recovery for damages occasioned by the gas exploding by reason of its coming in contact with the light.[182] In commenting upon the last two cases cited, the Supreme Court of Maryland pointed out the distinction between them and those cases where it was held not to be contributory negligence to use a light in searching for gas: "In these cases where the explosion instantly followed upon a light being brought in contact with the gas, and there could be no possible dispute that the bringing of the light in contact with the gas caused the explosion; but when there is not such a

[179] Schermerhorn v. Metropolitan Gaslight Co., 5 Daly 144; Parry v. Smith, L. R. 4 C. P. Div. 325; 33 Gas J. 899.

[180] Washington Gaslight Co. v. Eckoff, 7 App. Cas. D. C. 372.

[181] Nichols v. Brush, etc., Co., 53 Hun 137; 6 N. Y. Supp. 601.

[182] Oil City Gas Co. v. Robinson, 99 Pa. St. 1; 13 Rep. 253; Lanigan v. Gaslight Co., 71 N. Y. 29. See, also, King v. Consolidated Gas Co., 90 N. Y. App. Div. 166; 85 N. Y. Supp. 728; Lodge v. United Gas Co., 209 Pa. 553; 58 Atl. Rep. 925.

connection between the act of entering the house with a lighted lamp and the explosion of gas as to establish with a certainty and to the exclusion of any other reasonable hypothesis, the relation of cause and effect, the question as to what caused the explosion is for the jury to solve under proper instructions from the court. When, therefore, as here, more than ten minutes intervened between the time the lamp was taken into the cellar and the time the subsequent explosion occurred, and when, as here, the lamp itself was uninjured, it would be impossible for the court to assume that the lighted lamp caused the explosion, and to rule, as a conclusion of law, that the plaintiff's employees were guilty of contributory negligence in taking the lamp into the cellar; this is true also with respect to the lighting of matches to ignite the gasoline in the stove."[183] Where gas escaped into a sewer from a defect in a pipe, and the plaintiff, a civil engineer, entered the sewer, whereupon an explosion followed, it was held that there could be no recovery, the court saying: "The gas company was responsible for what might, in the nature of things, occur from its neglect, and its responsibility was not limited by what its officers may have thought to be improbable or even impossible. The gas pipe and sewer were in the immediate vicinity of each other. In the former was a defect, and from it the gas, not merely by absorption or by gravity, but also by pressure, found its way into the sewer. This certainly resulted from the defendant's negligence, because but for the defective pipe there could have been no escape of gas. But the plaintiff was also bound to the exercise of a reasonable care for his own safety. He was a civil engineer, and may be presumed to have had some knowledge of the dangerous nature of illuminating gas, of its power to penetrate the earth, and of its explosive character when mixed in certain quantities with common air. The defendant was bound for the consequences of its neglect, though these consequences were not and could not by ordinary prudence have been anticipated, whilst the plaintiff was bound only to a knowledge of the probable consequences of the fact of which he

[183] Consolidated Gas Co. v. Crocker, *supra*.

was cognizant, and to that ordinary prudence which the consequences required."[184]

[184] Oil City Gas Co. v. Robinson, *supra*. See Sauvage v. English Gas Co. of Paris, 4 Gas J. 136 (a French case); Vallee es qualite v. New City Gas Co., 7 Am. Law Rev. 767; Brown v. New York Gaslight Co., Anthon's N. P. Cas. 351; Parkin v. Wirksworth Gas Co., 26 Gas J. 496. Perhaps if the gas be accidentally lighted there may be a recovery. Bartlett v. Boston Gaslight Co., 122 Mass. 209. But where the pipes of the defendant under and around the plaintiff's building leaked, and a blacksmith carelessly permitted a red-hot iron to fall through the floor of his shop in the building, whereby an explosion was occasioned, it was held that the defendant was not liable; for the leaking was not the proximate cause of the fire. Jennings v. Davis, 187 Fed. 703.

It is not negligence for the owner of a house to leave a house vacant for nearly a month without inspection. Where a house was thus left vacant, and an odor of gas was discovered in and about it, and the neighbors called a policeman, who, in searching for the place of the escape of the gas, presented a lighted candle at an opening, causing an explosion, it was held that the negligence was not the negligence of the owner. Baltimore Consolidated Gas Co. v. Getty (Md.), 54 Atl. Rep. 660.

Early in the morning it was discovered that gas was escaping in a house, and one occupant of it was asphyxiated. The owner, being unable to shut it off from the building, between 8 and 9 o'clock, telephoned the defendant, stating the facts, and asked that some one be sent at once, which was promised, but no one came until 2 o'clock in the afternoon. About noon he, in attempting to find the leak, lighted a match, which caused an explosion of gas accumulated inside of a partition where was a defect in a pipe, which caused the leak.

It was held that the plaintiff, who occupied a room in the house, was entitled to recover for damages she suffered by the explosion, and that one of the causes of her injury was the failure of the defendant to act with reasonable promptness when notified of the dangerous condition of the premises. Memphis Consolidated Gas, etc., Co. v. Creighton, 183 Fed. 552.

A packing company was unable to discover the cause of an unusual odor in its cold storage plant. It asked another packing company to send its engineer to locate an ammonia leak; and while searching for the cause of the odor he was killed by an explosion of gas entering the building through a drain pipe. It was held that the packing company was not negligent in failing to warn him not to strike a match or to tell him that the odor might proceed from some other cause than ammonia, as no one knew the origin of the odor any better than he did, and he knew that his services had been requisitioned because the others had to acknowledge their incompetence in the matter. There was no other possible cause for the odor than an ammonia leak, and the usual recognized way in searching for an ammonia leak was to apply a lighted sulphur taper to the place where the leak might be suspected to be. Feely v. Natural Packing Co. (La.), 75 So. 837: distinguishing Rohr v. N. O. Gaslight Co., 136 La. 546; 67 So. 361.

§ 729. Contributory negligence a question for the jury.

Whether or not the plaintiff has been guilty of such negligence as contributed to the injury is a question for the jury, under the instructions of the court.[185] Where the charge was injury to the plaintiff's health by gas escaping into the house, it was held to be a question for the jury whether remaining in the house after a knowledge that gas was escaping was not a manifest lack of prudence.[186] And where the charge was that gas escaped into the barn and killed plaintiff's horse, it was held a question for the jury to determine whether he was guilty of contributory negligence in leaving the horse in the barn after discovering the odor of gas, the odor not being so strong as to possibly impress upon him a sense of actual danger.[187] To defeat the plaintiff, his contributory negligence must contribute materially and essentially to the injury; and the jurors are the judges of this question.[188] The conduct of the parties may be shown, in order that the jury may determine whether or not the plaintiff neglected to use ordinary care in seeking relief or resorting to expedients readily available for his own protection and security.[189] Where the deceased was killed by inhaling gas, but the evidence showed that he was under certain

[185] Kibele v. Philadelphia, 105 Pa. St. 41; Ottersbach v. Philadelphia, 161 Pa. St. 111; 28 Atl. Rep. 991; Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233; Scheemer v. Gaslight Co., 147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653; Pine Bluff, etc., Co. v. Schneider, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366; German-American Ins. Co. v. Standard Gaslight Co., 67 N. Y. App. Div. 539; 73 N. Y. Supp. 973; Oliver Stove Works v. Ft. Pitt Gas Co., 210 Pa. 141; 59 Atl. Rep. 819; Bandler v. People's G. & C. Co., 108 Ill. App. 187; People's G. & C. Co. v. Amphlett, 93 Ill. App. 194. See Hamma v. Haverhill Gaslight Co., 203 Mass. 572; 89 N. E. Rep. 1043.

[186] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233. See Hunt v. Lowell Gaslight Co., 1 Allen 343.

[187] Lee v. Troy, etc., Co., 98 N. Y. 115.

[188] Oil City Fuel Supply Co. v. Boundy, 122 Pa. St. 449; 15 Atl. Rep. 865; Lanigan v. New York Gaslight Co., 71 N. Y. 29.

[189] Holly v. Boston Gaslight Co., *supra*.

stress of duty, it was held to be a question for the jury whether the risk run did not seem to be great, and if there had been ventilation would not have been great; and for that reason he could have taken the risk without releasing the defendant by his contributory negligence.[190] An inspector of a water company went upon the premises of a gas company to examine a gas meter. The meter was in a shed, and the officers of the gas company assured him that there was no danger in taking a lighted candle into the shed, and demonstrated the fact by themselves lighting matches first. He was injured by an explosion of gas that had accumulated in the shed. It was held that the fact the inspector had apprehended danger was not conclusive evidence of contributory negligence on his part, but the question was one for the jury.[191]

§ 730. Negligence of parent, wife or servant.

In those jurisdictions where the negligence of the father or mother is allowed to defeat the right of his minor child to recover damages caused by the inhaling of gas or its explosion, the child must show not only that it was free from contributory

[190] Finnegan v. Fall River Gas Works Co., 159 Mass. 311; 34 N. E. Rep. 523; Citizens' Gaslight, etc., Co. v. O'Brien, 118 Ill. 174; 8 N. E. Rep. 310.

[191] Washington Gaslight Co. v. Eckloff, 7 App. D. C. 372.

Where a city caused breaks in gas pipes in digging a sewer, it was held that the owner of a cellar, in which an explosion occurred could not have anticipated that the escaping gas would follow an old sewer into his cellar. Aurora Gaslight Co. v. Bishop, 81 Ill. App. 493.

In an action by a guest against an innkeeper, for damages from asphyxiation by gas from defective fixtures in the room assigned to him, the question is for the jury, whether the defendant was negligent and the plaintiff free from contributory negligence. If the defect in the room was obvious, the guest must use reasonable care to avoid the injury, and, if he failed to do so, he can not recover. The innkeeper was not an insurer of his guest's personal safety, but his liability does extend to injury received by him from being placed in unsafe or unsanitary rooms. Patrick v. Spring, 154 N. C. 270; 70 S. E. Rep. 395.

negligence, but also its father or mother; and a want of ordinary care of the father or mother will defeat its cause of action.[192] But it has been held that negligence on the part of the parent which partly occasioned the accident was not such negligence as would defeat its cause of action; and that negligence which would not defeat an adult was not such as would defeat a minor.[193] Where the evidence in a case showed that the mother and her infant child, who was the plaintiff, slept together in a room without gas fixtures, and in the morning the mother was found dead and the child insensible, and there was an entire absence of evidence to show that either the mother or child knew of the escape of gas, or was conscious of its presence, in time to leave or take precautions against or prevent its effect by opening the windows; and it was shown that the mother was a sober and prudent woman; and that on the day before there was no smell of gas in the street, it was held that the evidence showed due care on the part of the child.[194] The negligence of the husband or his servant acting under his directions will bar the right of the wife to recover.[195] So the negligence of the plaintiff's servant will bar his (the plaintiff's) right to recover; as where he went with a lighted candle to search for escaping gas.[196] So, again, the negligence of the deceased will bar his representatives.[197] But where the deceased was a servant, and was directed to go to the place by the use of a ladder of a certain length, but selected one much shorter; it was held that he was bound to select the course which was farthest from danger, and if there was any difference in the two ways, it was a question for the jury to determine if he deliberately chose the most dangerous one.[198]

[192] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233.

[193] Lannen v. Albany Gaslight Co., 46 Barb. 264; affirmed 44 N. Y. 459.

[194] Smith v. Boston Gaslight Co., 129 Mass. 318.

[195] Vallee es qualite v. New City Gas Co., 7 Am. Law Rev. 767. Husband sent a servant to search for gas, who took a lighted candle.

[196] Pine Bluff Water and Light Co. v. Schneider, 62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366.

[197] Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432.

[198] Citizens' Gaslight, etc., Co. v. O'Brien, 118 Ill. 174; 8 N. E. Rep. 310.

§ 731. Contributory negligence of tenant may bar landlord.—reversionary interest.

The negligence of the tenant will bar the landlord recovering for damages to his property caused by an explosion.[199] Thus where gas escaped from a street main into a house, and the tenant going in search of the escaping gas with a lighted candle caused an explosion, it was held that if he was negligent, thus causing the explosion, the landlord could not recover for injuries to his house. "If the tenant," said the court, "upon discovering the presence of gas in a large quantity in the house, neglected to give notice to the agents or servants of the gas company, or take reasonable precautions to remove or exclude the gas, and recklessly brought the flame of a candle in contact with it, thus bringing about injurious effects which would not have followed but for such reckless or negligent conduct on his part, the gas company ought not to be held responsible for those results. If the intervening misconduct of the occupant of the building produced the explosion, which was the immediate cause of the injury to the building, the plaintiff cannot charge the legal responsibility for that result upon the original negligent act or omission of the gas company."[200] But if the tenant was not guilty of any negligence, then, of course, the landlord could recover damages from the gas company. In such an event the landlord has the burden to show that the injury was caused by the gas company's negligence; that the tenant's negligence did not materially contribute to the injury, in addition to showing that his own act did not contribute to it; and that the tenant, if he discovered the presence of gas, took reasonable means and precautions to remove and exclude it, or, if he had no knowledge of what precautions should have been taken, he made proper efforts to notify the gas company. If the tenant accidentally ignited the gas, or if he reasonably supposed the gas proceeded from another source, as from a furnace, and under that impression went in search of it with a light, thus causing an explosion,

[199] Creel v. Charleston, etc., Gas Co., 51 W. Va. 129; 41 S. E. Rep. 174.

[200] Bartlett v. Boston Gaslight Co., 117 Mass. 533; 19 A. Rep. 421.

the landlord may recover for the damages occasioned his house by the explosion.[201]

§ 732. Negligence of contractors.— Lessee.

A gas company cannot escape liability by simply placing the management of its gas works in charge of a person called a "lessee."[202] But there is no doubt that the company would not be liable if it had made an actual lease of its plant, and surrendered all control over it. Where a contractor had not yet turned over to the gas company the plant, including the mains in the street, he was constructing for it; and gas escaped because the mains were not securely connected with each other, the gas company was held liable. As to third persons the contractor was regarded as the agent of the gas company, on the ground that the right to lay and put down gas mains in the street was a permission from the municipality and the exercise of a right under its charter; and therefore the gas company could not escape liability of letting the contract to an independent contractor. In passing on the case the court used the following language: "Even though the person who causes the injury is a contractor, he will be regarded as the servant or agent of the corporation for which he is doing the work, if he is exercising some chartered privilege or power of such corporation with its assent which he could not have exercised independently of the charter of such corporation. In other words, a company seeking and accepting a special charter must take the responsibility of seeing that no wrong is done through its charter powers of persons to whom it has permitted their exer-

[201] Bartlett v. Boston Gaslight Co., 122 Mass. 209. See Sherman v. Fall River Iron Works Co., 2 Allen 524.

It cannot be said as a matter of law that a tenant of a flat, who perceives the odor of escaping gas, enters an adjoining vacant apartment without permission, lights a match to aid him in ascertaining the source of the escaping gas, causing an explosion by which he is injured, has contributed to his injury to the extent that he is barred from recovering damages. People's Gaslight and Coke Co. v. Amphlett, 93 Ill. App. 194.

[202] Consolidated Coal Co. v. Seninger, 79 Ill. App. 456; affirmed 179 Ill. 370; 53 N. E. 733.

cise." [203] But a result diametrically opposite to this decision was reached in another State; and in passing on the case the court used the following language: "It is to be regretted that corporations invested with the right of appropriating private property and entering the public highways for the purpose of laying their pipes in which to transport and distribute one of the most dangerous natural agencies in existence should be permitted to relieve themselves from the duties and responsibilities of business by letting part of the work requiring the highest degree of care to an independent contractor, but the law is so settled." [204] Where the plaintiff was a butler in the employ of a club, and defendant had been employed by the club to make alterations in the club house, and he had contracted with a gasfitter to do the gas fittings, which he did; it was held that if the gasfitter laid down any pipe not specified in his contract with the defendant, and by reason of a defect in such pipe the gas escaped, the defendant was not liable; and it was also held that even if the pipe was included in the contract, and the gas had been turned on by the plaintiff's own order while the defendant's men were in the house, the house being unoccupied and not completed, that the plaintiff could not recover.[205]

[203] Economic Fuel Gas Co. v. Myers, 168 Ill. 139; 49 N. E. Rep. 66; affirming 64 Ill. App. 270; 1 Chic. L. J. Wkly. 276. A similar decision is Hardaker v. Idle Dist. Council [1896], 1 Q. B. 335; 65 L. J. Q. B. (N. S.) 363; 74 Law. T. Rep. 69; 44 W. R. 323; 60 J. P. 196. For other cases to same effect, see Gray v. Pullen, 5 B. and S. 970; 34 L. J. Q. B. 265; 11 L. T. 569; 13 W. R. 257; Woodman v. Metropolitan, etc., Co., 149 Mass. 335; 21 N. E. Rep. 482; 4 L. R. A. 213; Denning v. Terminal Ry., 49 N. Y. App. Div. 493; 63 N. Y. Supp. 615; Vosbeck v. Kellog (Minn.), 80 N. W. Rep. 957; Holliday v. Nat. Telephone Co., 68 L. J. Q. B. 1016; 81 L. T. 252; 47 W. R. 658; 15 T. L. R. 483; [1899] 2 Q. B. 392.

[204] Chartiers Valley Gas Co. v. Lynch, 118 Pa. St. 362; 12 Atl. Rep. 435; Chartiers Valley Gas Co. v. Waters, 123 Pa. St. 220; 16 Atl. Rep. 423; 25 Am. and Eng. Corp. Cas. 400. See Phœnix, etc., Co. v. Dethick, 14 Gas J. 536.

A gas company by permitting a consumer to employ a person to put in a gas pipe and turn on the gas, does not make such person its agent, so as to render it liable for an explosion caused by his negligence. Flint v. Gloucester Gaslight Co., 3 Allen 343.

[205] Rapson v. Cubitt, 9 Mess. & Wels., 710; C. and M. 64.

§ 733. Right of action over.

The fact that a gas company has been compelled to pay damages because of its negligence will not always bar its right to recover from the person guilty of the original act that led on to the negligent conduct of the company. Thus, where it appeared from the evidence that an explosion was occasioned by gas leaking from a broken pipe of the plaintiff gas company, and that judgments had been recovered against it by the parties injured, from which appeals had been taken which were subsequently compromised; it was held that the gas company could recover from the traction company the damages it had sustained by reason of the negligence of the latter in excavating the street and causing the breaking of its pipe, in an action of trespass brought to recover the money paid by it for the injuries caused by the negligence of such traction company.[206] Where it is possible to construct a sewer without injury to gas mains, a city may recover damages from a contractor constructing the sewer because of his negligent construction of it, when it has had to pay a third person damages caused by the contractor's negligence.[206a]

§ 734. Liability of gasfitter.

If a gasfitter, in fitting up a house, put in defective pipes; or if in repairing those already in, he repairs them defectively, and thereby gas escapes and injures the inmates, or explodes, injuring the house, he will be liable for the damages sustained, the same as where a gas company negligently permits gas to escape.[207]

§ 735. Evidence to show due care on gas company's part.

The defendant gas company may always show that it had used due care to prevent leaks or explosions, and for that pur-

The action for damages incurred from the operation of a plant is properly brought against the person operating it, although another person defectively erected such plant. Hyde Park, etc., Co. v. Porter, 167 Ill. 276; 47 N. E. Rep. 206; affirming 64 Ill. App. 152.

[206] Philadelphia Co. v. Central Traction Co., 165 Pa. St. 456; 30 Atl. Rep. 934. See District of Columbia v. Washington Gaslight Co., 9 Mackey 39; 161 U. S. 316.

[206a] Portland Gas & Coke Co. v. Giebisch (Ore.), 165 Pac. 1004.

[207] Parry v. Smith, L. R. 4 C. P. Div. 325; 33 Gas J. 899; Hemstead v. Phoenix Gaslight, etc., Co., 3 H. and C. 745; 11 Jur. N. S. 626; 13 W. R. 662; 34 L. J. C. P. 108; 14 Gas J. 399; Moore v. Lanier, 52 Fla. 353; 42 So. Rep. 462.

pose it may show that it had used proper material in the construction of its plant; that it had used proper pipes or mains, where the charge is that they had become weak and rotten from long use or from the effect of the elements upon them.[208] And where the charge is that it negligently permitted the gas to escape after it had notice that it was escaping, the company, to show due diligence on its part, may show its system of complaints for leaks, and what was its course of business with regard to such complaints, for the purpose of showing that due preparation for accidents had been made by it, but not for the purpose of showing that it had exerted the same degree of diligence it did in the case as it had done in other cases.[209] In one case it was held that the original entries in the gas company's books of leaks and repairs along the line of pipe for five months prior to the explosion where it was charged the leak occurred were competent, as tending to show that the company had provided an adequate system for the protection of the public from the unusual danger of escaping gas.[210] Copies of notices sent by the gas company to consumers calling attention to the liability of leaks to occur from the excavations being made in the streets by the city or various construction companies within a year or so prior to the accident complained of, are admissible on the question of due care on the part of the gas company.[211]

[208] Consumers' Gas Trust Co. v. Corbaley, 14 Ind. App. 549; 43 N. E. Rep. 237.

[209] Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 233.

[210] Koplan v. Boston Gaslight Co., 177 Mass. 15; 58 N. E. Rep. 183; Powers v. Boston Gaslight Co., 158 Mass. 257; 33 N. E. Rep. 523.

The rules of boards of fire underwriters and other electric light companies, prescribing the manner of wiring buildings, are inadmissible evidence on an issue whether an electric light company had defectively insulated its wires in a building. Dechert v. Municipal, etc., Co., 57 N. Y. Supp. 225.

[211] Powers v. Boston Gaslight Co., 158 Mass. 257; 33 N. E. Rep. 523.

Where the gas escaped from a street main, passed under the frozen crust of the surface of the ground into the plaintiff's cellar, a witness, experienced in digging holes through the frozen earth, was allowed to testify how much labor it would take to dig such holes as had been dug by the gas company through the frozen earth in search for the leaks, in order to show whether it had used reasonable dili-

§ 736. Expert evidence to show effect of electrolysis.

Where the question arises that the defects in the gas mains or pipes were caused by electrolysis, experts may be called to show what effect electricity has upon gas mains or pipes, and its tendency to destroy the iron fibre and render them unsafe, and to give their opinions that the pipes were affected by electrolysis, and the reasons for their opinions.[212]

§ 737. Evidence in cases of inhalation of gas.

In an action to recover damages occasioned by the inhalation of gas, aside from the question of an expert evidence, it may be shown that the plaintiff and other members of his family living with him had been in good health until the influx of gas; and that after that they all became ill, or even some of them died.[213] No particulars, however, of the sickness of the other members of the family are admissible to show the nature of the gas and its effects upon such other members, who inhaled it at the same time with the plaintiff.[214] Nor is it admissible to show that wherever the gas entered a house in the neighborhood, where their drains were connected with the sewers through which the gas escaped into the plaintiff's house, sickness followed.[215] Nor can it be shown that gas escaped into a block of houses directly opposite plaintiff's house, in order to charge the defendant with notice of the leak, before it is shown it came into the plaintiff's.[216] Where the plaintiff's theory is that the gas escaped into a sewer, and thence through the house drain into his house, it may be shown that it entered other houses similarly connected with the same sewer, or with a sewer entering into the sewer into which it is claimed it

gence in finding and stopping the leak. Emerson v. Lowell Gaslight Co., 3 Allen 410.

[212] Koplan v. Boston Gaslight Co., 177 Mass. 15; 58 N. E. Rep. 183.

[213] Hunt v. Lowell Gaslight Co., 1 Allen 343; Hunt v. Lowell Gaslight Co., 8 Allen 169; 85 Am. Dec. 697. See Beyer v. Consolidated Gas Co., 44 N. Y. App. Div. 158; 60 N. Y. Supp. 628.

[214] Hunt v. Lowell Gaslight Co., 8 Allen 169; 85 Am. Dec. 697.

[215] Hunt v. Lowell Gaslight Co., 3 Allen 410.

[216] Emerson v. Lowell Gaslight Co., 6 Allen 146; 83 Am. Dec. 621. But see Apfelbach v. Consolidated Gas Co., 204 Pa. 570; 54 Atl. Rep. 359.

escaped.[217] The gas company may not introduce evidence to show that plaintiff's sickness and his family's was in fact typhoid fever, that earlier occupants of the house had been afflicted with much illness of the same character, that several families had been compelled to recover from it on that account, and that its location was low, upon made land, and it was generally regarded to be unhealthy.[218] It may be shown that gases were set in motion by the illuminating or natural gas escaping into the sewer where they were, and that they were pushed into the plaintiff's house, causing illness of which complaint is made.[219] If the charge be that the company's escaping gas caused the death of the plaintiff's child, the plaintiff must show not only the negligence of the company, the fact that the death was due to it, and that neither he nor the child contributed to it, where the plaintiff is required to show his freedom from contributory negligence.[220] In the case just cited, the child was found dead in a cellar, the gas escaping from a leak in a joint of the gas pipe, which had never leaked before and around which the plaintiff had just caused a load of coal to be thrown; but the physician could not say that its death was due to the inhalation of gas; and it was held that an instruction to find for the gas company was proper.[221] Evidence

[217] Butcher v. Providence Gas Co., 12 R. I. 149; 34 Am. Rep. 626; 18 Alb. L. Jr. 372. Ottawa Gaslight and Coke Co. v. Graham, 35 Ill. 346.

[218] Hunt v. Lowell Gaslight Co., 1 Allen 343.

[219] Hunt v. Lowell Gaslight Co., 8 Allen 169; 85 Am. Dec. 697.

As to what is sufficient to show due care on the part of the plaintiff who has breathed the gas while asleep, see Smith v. Boston Gaslight Co., 129 Mass. 318, cited elsewhere, and Shogland v. St. Paul Gaslight Co., 89 Minn. 1; 93 N. W. Rep. 668.

[220] State v. Consolidated Gas Co., 85 Md. 637; 37 Atl. Rep. 263. See Apfelbach v. Consolidated Gas Co., 204 Pa. 570; 54 Atl. Rep. 359; Morgan v. United Gas Imp. Co., 214 Pa. 109; 63 Atl. Rep. 417.

[221] It may be shown that the plaintiff for a long time — as, for two years — made no claim for damages. Emerson v. Lowell, 3 Allen 416.

The master is not liable for injuries to his servant from exposure to poisonous gases generated by coal fires in his shop, whose effect is enhanced by the admission of extreme cold air, where he is ignorant of the unwholesome and dangerous condition of the building, and could not, by the exercise of ordinary care, have known of the danger. Maitland v. C. L. & R. R. Co., 3 Ohio Leg. News. 289.

is admissible, in case of an injury from inhaling gas, to show that when artificial respiration was resorted to the odor of gas coming from the lungs was perceptible.[222]

§ 738. Expert evidence on inhalation of gas.

Where the action is to recover damages caused to the plaintiff or his intestate by the inhaling of gas that had been negligently released, or permitted to escape, testimony of physicians to show the effect upon the health or system of the plaintiff or the intestate is admissible; and they may testify whether or not the breathing of the gas produced the particular sickness it is claimed to have done.[223] But a physician who had been in practice for several years, without any experience concerning the effects upon the health by breathing illuminating gas, was held not to be qualified to testify in relation thereto as an expert, and experience gained from attending upon other persons made ill by breathing gas from the same leak was not sufficient to qualify him to testify, nor was he permitted to testify that the plaintiff had told him that gas entered his house a year or

The owner of a blast furnace is not liable to his servant for injuries received by the inhalation of gas not sufficient in quantity to affect an ordinary individual,— as, where his lungs are over-sensitive from a previous illness, if such master had no reason to suppose he was not sufficiently strong to endure the gas without risk. Parlin, etc., Co. v. Finfrouck, 65 Ill. App. 174.

For instance where the conduct of the superintendent in quieting the fears of the servants were enough to prevent the defense of contributory negligence, see Wagner v. H. W. Jayne Chemical Co., 147 Pa. St. 475; 29 W. N. C. 490; 23 Atl. Rep. 772.

[222] Merneilley v. Employers', etc., Corp., 148 N. Y. 596; 43 N. E. Rep. 54; 31 L. R. A. 686.

External injury in an action to recover damages occasioned to the person by an explosion of gas need not be shown. Fellwood v. Pearson, 23 Gas J. 248. The fact of actual injury is a question for the jury. Sipple v. Laclede Gaslight Co., 125 Mo. 81; 102 S. W. Rep. 608.

Damages for a severe shock occasioned by an explosion may be recovered. Fellwood v. Pearson, *supra*.

[223] Hunt v. Lowell Gaslight Co., 8 Allen 169; 85 Am. Dec. 697.

Evidence that the plaintiff did not claim any damages for more than two years after the injury is admissible; but evidence that the plaintiff, while sick in bed from the effects of the gas, did not ascribe it to the effects of the gas or say anything as to the cause of it, is not admissible. Emerson v. Lowell Gaslight Co., 3 Allen 410.

so before, and that the inhalation of it made him sick.[224] And in this same case it was held that the evidence of an agent of the company in charge of its gas works, who did not know or believe gas was noxious to health, was not admissible for the purpose of affecting the question of care and diligence which it was the duty of the company to exercise, but it was held that he was competent to give his opinion upon the general question as to the alleged deleterious effect of gas upon the health of persons exposed to it.[225] The plaintiff may, however, show all the facts and circumstances attending his sickness, to which may be added the opinions of skilled and experienced persons as to the cause which produced it; and the opinion may be taken as to whether or not it might have been or probably was produced by the gas to which plaintiff was exposed in his house.[226] So expert evidence is admissible to show that hard coal burned in a generator would produce carbonic acid gas and carbonic oxide, that both are poisonous, and the former, because it is lighter than air, would ascend to the ceiling, in order to show the presence of gas at the place where the victim fell; but he may not be asked if gas was present at such place, being only permitted to say that if such gas escaped it would have a tendency to go to the place where the deceased fell.[227] And a witness having no practical experience, all his knowledge having been acquired from reading standard authorities and study, may testify as to the effect of gases from hard coal on the human being.[228]

§ 739. Proof of effect upon growing vegetation or grass.

In order to determine whether or not gas escaped to the injury of the plaintiff, it may not only be shown that the odor

[224] Emerson v. Lowell Gaslight Co., 6 Allen 146; 83 Am. Dec. 621.

[225] *Ibid.* Emerson v. Lowell Gaslight Co., 3 Allen 410.

[226] Emmerson v. Lowell Gaslight Co., *supra.*

[227] Citizens' Gaslight, etc., Co. v. O'Brien, 15 Ill. App. 400; affirmed 118 Ill. 174.

[228] Citizens' Gaslight, etc., Co. v. O'Brien, 15 Bradw. 400.

Such a witness may be asked what practical experience he has had with such gases. Citizens' Gaslight,

of gas was perceptible [229] at the point in controversy, but its extent or amount,[230] the discoloration of the ground or earth caused by it,[231] and also the effect upon vegetation or grass; and in order to show the effect, the state of the vegetation before the leak occurred, during the time the gas was flowing, and after it ceased to flow may be shown.[232] Thus proof of the decay of vegetation, its death, together with the leakage of a large amount of gas after the gas main was laid and until it was recalked, the healthy growth of the vegetation after such recalking, will support the conclusion of the jury that the escape of the gas was the cause of the injury to the vegetation.[233]

§ 740. What acts of negligence a question for the jury.

It is impossible to lay down any general rule with reference to what acts or admissions shall be determined by the court and what by the jury as instances fixing a liability upon those guilty of them. In instances of leaks and explosions the general rules of negligence apply, the only confusion being that which arises out of their application to particular instances. Illustrations have already been given; and further illustrations must necessarily be little more than a digest of the cases. Where premises had been vacant several weeks, of which fact the gas company had due notice, and had been requested to cut off the gas supply; and on the evening of the explosion they were let to some negroes; and it appeared that the company had cut off the gas by the meter cock, but not by the service cock, which was under the curbstone; that some one had tam-

etc., Co. v. O'Brien, 118 Ill. 174; 8 N. E. Rep. 310.

229 Koplan v. Boston Gaslight Co., 177 Mass. 15; 58 N. E. Rep. 183.

230 Emerson v. Lowell Gaslight Co., 3 Allen 410; Johnson v. Northport, etc., Co., 50 Wash. 567; 97 Pac. Rep. 746.

231 Consumers' Gas Trust Co. v. Perrego, 144 Ind. 350; 43 N. E. Rep. 306; 32 L. R. A. 146; Bloomfield, etc., Co. v. Calkins, 1 T. and C. (N. Y.) 549.

232 Siebrecht v. East River Gas Co., 21 N. Y. App. Div. 110; 47 N. Y. Supp. 262; Butcher v. Providence Gas Co., 12 R. I. 149; 34 Am. Rep. 626; 18 Alb. L. Jr. 372; Miller v. I. P. Thomas & Sons Co., 89 N. J. L. 364; 98 Atl. 192.

233 Evans v. Keystone Gas Co., 148 N. Y. 112; 42 N. E. Rep. 513; 28 Chic. Leg. News. 160; 30 L. R. A. 651; 51 Am. St. Rep. 681; affirming 21 N. Y. Supp. 191.

pered with the meter cock and let the gas on, cutting it off again; and if the gas had been cut off at the service cock there would have been no explosion, It was held that it was a question for the jury whether the gas company was guilty of negligence, or whether the accident happened in consequence of the negligence of the plaintiff or his tenant. A non-suit was held to be erroneous.[234] Where the explosion was alleged to have been occasioned by a gasfitter called to make a connection, who, it was claimed, did so without turning off the gas, it was held to be a question for the jury to decide whether the gas company was guilty of negligence. The evidence was conflicting.[235] Where the explosion was occasioned by the light of the workman making a connection; and the company insisted that there was not a strong smell of gas, and the workmen were therefore justified in using the light, it was held to be a question for the jury whether or not the workmen had been guilty of negligence.[236] Where the city officers had removed the earth supporting the gas company's pipes, in constructing a sewer, and the gas company requested the court to charge the jury that it was unreasonable to require it to have an inspector present to see if the pipes were properly supported, and having a right in the street, it might rely upon the city to notify it of the condition of the pipes; but the court refused, and charged the jury that it was a question for it to decide whether or not the company had used due care.[237] Where it was alleged that the company had negligently permitted gas to escape from its street mains and enter a house where lights were known to be burning, and the evidence showed that the company's servants requested that the lights be put out; but the plaintiff insisted that the gas

[234] Chisholm v. Atlanta Gaslight Co., 57 Ga. 28.

[235] Mersey Docks, etc., v. Liverpool, etc., Co., 26 Gas J. 327. The verdict was for the plaintiff.

The same method of determining the company's negligence was adopted where the explosion was occasioned by a failure to keep water in the meter. Hacker v. London Gas light Co., 32 Gas J. 781.

[236] Ellis v. London Gaslight Co., 32 Gas J. 849.

[237] Butcher v. Providence Gas Co., 12 R. I. 149; 34 Am. Rep. 626; Chadwick v. Corporation of Wigan, 28 Gas J. 562.

found entrance through an open window nearly level with the trench from the main, a hole having been made in the main near the window for a service pipe; it was held that it was a question for the jury, even though it thought the gas thus entered, whether the gas people might reasonably have foreseen it, were bound to have the window closed.[238] Where the service pipe did not fit the main, and there was a subsidence of the soil which carried down the main a year before the accident, which was known to the company's servants; and the gas passed under the ground from the place where the service pipe entered the main, entering the kitchen and exploded, it was held that there was sufficient evidence to go to the jury.[239] Where gas escaped from the pipes laid twelve years before, of which the gas company was duly notified; and it sent servants to examine the place, who said there was no danger; and on a second notification of gas escaping the company sent two men who put in an escape tube; and four days later an explosion occurred, injuring the plaintiff; it was held to be a question for the jury whether or not the company had exercised due care under the circumstances.[240] Where it was alleged that the servants of the gas company causing the explosion were drunk when repairing the leak, and that there was a small explosion previously from a break in the pipe, which had been improperly repaired; it was held that the defendant's care was a question for the jury.[241] Where the plaintiff put in a "bent," close to the joint with the service pipe, and also put in other pipes, all of which was inspected and approved by the gas company, and the evidence showed they had been carefully put in, and there was no decisive evidence to show how the "bent" became cracked, but it was shown that the explosion was caused by a servant of the company carelessly lighting a match in the cellar into which the gas had escaped from the leak in the "bent"; it was held

[238] Blenkiron v. Great Central Gas, etc., Co., 2 F. and F. 437; 9 Gas J. 292, 776; 3 L. T. R. 317. The verdict was for the defendant.

[239] Fare v. Bath Gaslight and Coke Co., 25 Gas J. 566.

[240] Boothman v. Mayor, etc., of Burnley, 20 Gas J. 585. The verdict was for the plaintiff.

[241] Hann v. Weymouth, etc., Co., 18 Gas J. 186.

that the leak in the plaintiff's pipe was not as a matter of law evidence of the plaintiff's negligence, but that it was a question for the jury.[242] Where the defendant denied that it had negligently permitted gas to escape from its pipe, and insisted that the leak was caused by the negligence of the city officers in not properly packing the earth under a pipe in building a sewer, it was held to be a question for the jury whether or not the company had used due care in seeing that, in restoring the earth to its place, its pipes were properly supported, and if injured, to see that the injury was repaired as soon as it could reasonably be done.[243] Where it appeared that the explosion was occasioned by a theft of a gas pipe and the going into the cellar with a light; and the evidence was conflicting whether notice of the leak had been given to the company, the secretary testifying that the complaint book showed that no notice of a leak had been given; the court charged the jury that it was a question for them whether the accident had been caused by the negligence of the company.[244] Where it was claimed that an explosion occurred from the negligence of the meter taker, who had removed a meter and left a pipe open, so that when the plaintiff turned on the gas it flowed from the pipe and ignited, and the company insisted that the employee properly stopped the pipe with white lead, etc., it was held to be a question for the jury whether he had done so.[245] Whether applying one's nose to an opening in a floor wherein a gas pipe was plugged, and from which the gas escaped, to ascertain if the gas was escaping is an act that due care requires, there being other well known tests, was held to be a question for the jury. Where the plaintiff lighted a gas radiator, laid down on a couch in the room and went to sleep; and while asleep the gas company, in order to improve the gas pressure, cut off the gas in the building, drew

[242] Lannen v. Albany Gaslight Co., 46 Barb. 264; affirmed 44 N. Y. 459.

[243] Butcher v. Providence Gas Co., 12 R. I. 149; 34 Am. Rep. 626; Medex v. Gaslight and Coke Co., 15 Gas J. 75.

[244] Griffiths v. City of London Gas Co., 16 Gas J. 139.

[245] Ward v. Gaslight and Coke Co., 14 Gas J. 915; 15 Gas J. 45, 75; 16 Gas J. 10, 38, 74, 108.

off the water accumulated in the pipes, and turned on the gas again, its usual practice being to warn the tenants of buildings of its intention to obstruct the flow of gas, but the evidence was conflicting as to what steps the company's servants endeavored to warn the plaintiff, there being testimony that they knocked on the door, but not sufficiently lound to arouse the plaintiff; it was held that it was a question for the jury whether the company's employees used such care as was incumbent on them under the circumstances, but there was no question of contributory negligence.[246] Where gas escaped into a cellar from a pipe eleven feet away resting in soft and shaly soil; and there was an abandoned coal mine under the entire neighborhood; and after the explosion the coal was found to be burning; and one witness testified that the pipe had broken on account of a sewer excavation, and another that the pipe was rotten; and there was evidence of an earlier trouble at the same point; it was held that it was a question for the jury, under the gas company's claim that the leakage was caused by the mine's caving in on account of the fire, whether it had been guilty of negligence, and that it was error to direct a verdict in its favor.[247] Where a company's piping was not connected with the piping in a building until the owner or tenant made an application for gas and furnished plans of the piping in the building, whereupon the company delivered a meter, letting the applicant make connection with its pipes, without itself making an examination; and the tenant of a store room, having received a meter, engaged a plumber to put it in and make the connection; and a pipe running into an apartment above the store was uncapped, from which gas escaped, killing the tenant's child; it was held to be a question for the jury whether the gas company had used reasonable precautions.[248] Where the gas escaped through a break in the street pipe into the plaintiff's sleeping room, to his injury; and the evidence

[246] Beyer v. Consolidated Gas Co., 44 N. Y. App. Div. 158; 60 N. Y. Supp. 628.

[247] Heh v. Consolidated Gas Co., 201 Pa. St. 443; 50 Atl. Rep. 994; 88 Am. St. Rep. 819.

[248] Schmeer v. Gaslight Co. of Syracuse, 147 N. Y. 529; 42 N. E. Rep. 202; 30 L. R. A. 653; reversing 65 Hun 378; 26 N. Y. Supp. 1128; 20 N. Y. Supp. 168.

showed that the break was probably caused by the settling of the earth after the construction of a nearby sewer; and that the gas had been escaping a whole day when discovered by a policeman; it was held that there was evidence enough to justify the submission of the case to the jury.[249] Where the bills of the gas company had a notice on them that information of all leaks should be sent to the office of the company; that a complaint of a leak was made to an employee of the company, and he promised to have it repaired; that afterwards a man sent to examine the leak found it in a chandelier, and worked about twenty minutes in repairing it; that the gas escaped during the night, to plaintiff's injury, from the chandelier, in which the next day was found a leak, which an expert testified could not be properly stopped without taking down the chandelier and taking off the casing; it was held that there was evidence for the jury from which to determine whether the gas company had undertaken to find and stop the leak, in which event it would be liable.[250] Where the gas company had no system of inspection, but waited for complaints before making inspections; and some of its pipes had been laid in cinder for twenty years, which had a tendency to corrode them; the question of negligence was considered one for the jury.[251] The coincidence of the decay and death of vegetation with the leakage of a large amount of gas after the laying of a new main and until its recalking: and the fact of the healthy growth of vegetation after the recalking, will sustain a conclusion of the jury that the escape of the gas was the cause of the injury.[252] A gas company's street main ran within a few feet of the cellar of a factory. An explosion occurred in the factory, injuring the plaintiff. Several months previous to that time a sewer connection for the factory had been made, which ran under the

[249] Greaney v. Holyoke, etc., Co., 174 Mass. 437; 54 N. E. Rep. 880.

[250] Ferguson v. Boston Gaslight Co., 170 Mass. 182; 49 N. E. Rep. 115.

[251] Prichard v. Consolidated Gas Co., 2 Pa. Super. Ct. 179; 39 W. N. C. 28.

[252] Evans v. Keystone Gas Co., 148 N. Y. 112; 42 N. E. Rep. 513; 28 Chic. Leg. News, 160; 30 L. R. A. 651; 51 Am. St. Rep. 681; affirming 21 N. Y. Supp. 161.

gas main. The testimony of the plaintiff tended to show escaping gas had been detected at the place where the gas main crossed the sewer connection for several weeks prior to the explosion, which occurred on the opening of a trap door into the cellar; that soon after an old and rusty break in the pipe immediately in front of the factory was discovered, and that the company had been notified of the presence of gas in the neighborhood more than two weeks before the explosion, but did nothing in response to it. The gas company denied receiving notice, and gave testimony in general rebutting the plaintiff's testimony. The plaintiff claimed that the gas escaped from a break in the gas main, passed through the sand until it reached the sewer pipe, followed this into the cellar, and there collected. It was held that the case was one for the jury.[253] For two weeks prior to an explosion of gas in a sewer manhole escaping gas had been detected; and it was the duty of the employees of the gas company lighting street lamps to report leaks they had detected. A leak in a main one hundred feet from the explosion was found in this main immediately after the explosion occurred, was repaired, and the gas ceased to flow. About two weeks before the explosion the company had been notified of escaping gas; and upon examination no escape of gas had been found. It was possible for the escaping gas from the leak to find its way through the earth, enter sewers, and accumulate in covered sewer holes. There was no probability of gas escaping from any other gas main than that of the defendant company. It was held that there was evidence enough to support a verdict for the plaintiff, in an action to recover damages occasioned by the explosion.[254] Where the action was to recover for the death of a horse, occasioned by it inhaling gas, an instruction to the jury that if the plaintiff "had reason to believe that the gas was escaping, and knew the danger of escaping gas, and left the

[253] Henderson v. Allegheny Heating Co., 179 Pa. St. 513; 39 W. N. C. 485; 36 Atl. Rep. 312.

[254] Tiehr v. Consolidated Gas Co., 51 N. Y. App. Div. 446; 65 N. Y. Supp. 10.

The court charged the jury that the evidence should exclude all other theories than the plaintiff's, tracing the origin of the exploding gas to the break in the defendant's pipe.

horse there without providing for the danger, thinking the escape of gas was not sufficient to do any damage, he cannot recover," was held to have been properly refused; for as a matter of law negligence was not an inevitable and necessary inference from the facts stated, but was a question for the jury.[255] Where the defect in a gas pipe was occasioned by the construction of a sewer, it was held to be a question for the jury whether or not the gas company having a proper system of inspection ought to have known of the leak sooner than it was in fact discovered.[256] If there be no evidence to show negligence on the part of the gas company, then the court must direct the jury to find against the plaintiff; and it is error to submit the question of negligence to the jury.[257] Where the explosion occurred in the cellar, the exploding gas having escaped from a break at the junction of the service pipe with the "riser"; and the company's workmen were engaged in repairing the mains opposite the house in which the explosion occurred, but there was no evidence to connect them in any way with the explosion, or to show that their work in any way affected the service pipe, the complaint was dismissed.[258] In an action against a natural gas company to recover damages for injuries arising from an explosion of gas in plaintiff's cellar, the case is for the jury where there is evidence tending to show that the gas could only have come from one of defendant's gas lines, and that it could have escaped from a break in such line.[259] Where it appears that the day

[255] Lee v. Troy, etc., Co., 98 N. Y. 115.

If it is shown that a pipe was broken and gas escaped from it whereby one is injured, the jury may infer negligence on the part of the gas company from the facts thus shown. Carmody v. Boston Gaslight Co., 162 Mass. 539; 39 N. E. Rep. 184.

[256] Koelsch v. Philadelphia Co., 152 Pa. St. 355; 25 Atl. Rep. 522; 18 L. R. A. 759; 34 Am. St. Rep. 653; Holly v. Boston Gaslight Co., 8 Gray 123; 69 Am. Dec. 633; Kibele v. Philadelphia, 105 Pa. St. 41 (on the duty of a patrolman to notify the city of a leak where the city is furnishing gas to consumers).

[257] Allegheny Heating Co. v. Rohan, 118 Pa. St. 223; 11 Atl. Rep. 789.

It was held that the evidence of an explosion was insufficient to submit to the jury. Hutchinson v. Boston Gaslight Co., 122 Mass. 219.

[258] Krzywoszynski v. Consolidated Gas Co., 4 N. Y. App. Div. 161; 38 N. Y. Supp. 929.

[259] Stoner v. Pennsylvania, etc., Co., 40 Pa. Super. Ct. Rep. 599.

before the explosion of natural gas which injured plaintiff's house, there was a break in the main which caused gas to enter plaintiff's house, that the break was repaired before the accident, that three days thereafter the gas again escaped at the point where the break occurred, and the evidence showed that the repair had been negligently done, the question of the gas company's negligence is for the jury.[260] Where in an action to recover damages for injuries occasioned by a defective oil burner, and there was a conflict in the evidence, it was held to raise a question for the jury.[261]

§ 741. Shipping explosives.

It is the duty of a person shipping an explosive, or an article that is otherwise dangerous, to fully disclose its dangerous character to the carrier before shipment. This is especially true of a shipment on ship where the article will be stored in the vessel with its cargo often beyond the possibility of examination. The act of negligence is the failure to disclose the dangerous character of the article shipped; and the burden to show there was no disclosure is upon the carrier. Such was said to be the case of a shipment of soap (Fels Naptha Soap), which contained from six to nine per cent. of chemically free naphtha. But when the manufacturers of a soap informed the shipping agent of the defendant of the character of the soap, that it gave off naphtha fumes, which, if the soap was stowed in a confined space, might be dangerous, and arranged that the amount shipped should be stowed in a place in which there

[260] O'Donavan v. Philadelphia Co., 223 Pa. 234; 72 Atl. Rep. 527.

[261] Carr v. Locomotive Co., 29 R. I. 276; 70 Atl. Rep. 196.

In an action by plaintiff for injuries received by the explosion of gas, it was admitted that defendant gas company's main broke, and the gas found its way into plaintiff's house where it exploded, but there was a dispute as to the cause of the break in the gas main, there being evidence of an old fracture therein. It was held that the question was for the jury. Shirey v. Consumers' Gas Co., 64 Atl. 541, 215 Pa. 399.

Employment in labeling bottles of beverage charged with carbonic acid gas is not dangerous as a matter of law, through their likelihood to explode while being handled. Herbert v. Parham, 86 S. C. 352; 68 S. E. 564.

Whether a broken main was so laid as to cause it to break is a question for the jury. Thompson v. Cambridge, 201 Mass. 77; 87 N. E. Rep. 486.

was a free circulation of air; and at a subsequent shipment of a large amount of the same soap similarly labeled he made no statement concerning its explosive character, but the carrier stowed it in place where no free circulation took place, and an explosion took place, it was held that the carrier was sufficiently informed of the dangerous character of the soap, and that it could not recover damages of the shipper, because he had made a full compliance with the requirements of the law.[262]

§ 742. Stove polish exploding.

To put an inflammable stove polish on the market is an act of negligence. Thus where it was shown that a stove polish contained naphtha, but it was represented to the purchaser that it could be used on a warm stove; and while so using it, it exploded, injuring the person using it, it was held that the jury had a right to infer that the temperature of the stove was the cause of the explosion; and that it was proper to deny a non-suit.[263] To place such a stove polish on the market without properly labeling it so as to show its explosive character, is an act of negligence.[264]

§ 743. Pleading charge of explosion caused by negligence.

It is not enough to merely allege that the injury complained of was occasioned "by an explosion of natural gas caused by the defendant's negligence in not properly caring for their gas pipes running in front of plaintiff's place of business, whereby gas escaped from said pipes into plaintiff's said premises and became ignited."[265] But the complaint need not state what particular gas main was defective.[266]

[262] International Mercantile Marine Co. v. Fels, 170 Fed. Rep. 275, affirming 164 Fed. Rep. 337.

[263] Cunningham v. C. R. Pease House Furnishing Co., 75 N. H. 290; 73 Atl. Rep. 405; Gately v. Taylor, 211 Mass. 60; 97 N. E. 619.

[264] Clement v. Crosby & Co., 157 Mich. 643; 122 N. W. Rep. 263; 16 Det. Leg. N. 542. In this case it was also held that a variance between the complaint and proof concerning how ignition was caused was not fatal to the plaintiff, if he was using the stove polish as directed and without negligence.

[265] Williams v. Brentford Gas Co., 13 Ont. W. Rep. 605.

[266] Richmond v. Gay, 103 Va. 320; 49 S. E. Rep. 482.

§ 744. Request for gas.—Implication as to condition of house for its receipt.

Where a gas company turns on gas in a house in response to an application from the property owner or his tenant, the company may fairly regard such an application as an affirmative assertion by the owner that the interior system of pipes constructed and maintained by the owner is sufficiently secure to permit the gas to be introduced with safety; and if it turns on the gas by the direction of the property owner or his tenant, and then discovers the existence of a leak, it performs its full duty if it immediately shuts off the gas and gives notice to the owner or his tenant. If an explosion results afterwards from the gas that has escaped, the company will not be liable for the loss.[267]

§ 745. Turning on the wrong stop-cock or into wrong house.

A gas company is presumed to know the location of its stop-box; and if it turns on gas from a stop-box which reaches unused and defective pipes in a building, it is liable for the consequences thereof.[268] So if it turns on the gas at a wrong stop-box, and the escaping gas enters an adjoining building and explodes, the company is *prima facie* liable for consequent injuries, such as the destruction of glass.[269]

§ 746. Enjoining maintenance of leaky reservoir.

A gas company has no right to maintain a leaky gas reservoir; and if it is maintained so as to permit gas to escape to such an extent as to be a nuisance, its maintenance may be enjoined. Even though it may be repaired so as to prevent damages to property, if in fact it injures the property, its maintenance should be enjoined, unless the company offers to repair it; and a bill

[267] Soles v. People's Natural Gas Co., 48 Pa. Super. Ct. 84.

If the leak occurred in the company's own gas pipe, then the company is liable for the consequence thereof. Van Telson v. Quebec Ry. L. H. & P. Co., 43 S. C. (Ont.) 420.

[268] Basnett v. Cherryvale Gas, etc., Co., 99 Kans. 716; 163 Pac. 161.

[269] Maryland Casualty Co. v. Cherryvale, etc., Co., 99 Kans. 563; 162 Pac. 313; Basnett v. Cherryvale Gas, etc., Co., 99 Kans. 716; 163 Pac. 161.

for an injunction should be retained until it be ascertained whether the nuisance can be abated.[270]

§ 747. Duty of gas company to shut off gas in case of a conflagration.

Unless some statute or ordinance requires it, a gas company owes no duty to a consumer (or, perhaps, to anyone else), in case of a conflagration, to cut off its gas from the burning house where he has provided his own gas appliances; and especially is this true in the absence of a request to cut it off or of notice of the danger.[271]

§ 748. Manhole, gas escaping into.

Permitting gas to escape from a leaking pipe into a manhole will be sufficient to render the gas company liable where the negligence of the company is approximate cause of the injury resulting from an explosion, though the particular accident could not have been anticipated.[272] Where an underground concrete chamber could only be entered through a manhole, and no gas pipe ran through it, it was held that merely showing an explosion of gas and resultant injury was not sufficient, the doctrine of *res ipsa loquitor* not applying. The plaintiff in order to recover was required to show how the gas got there; and that showing must demonstrate negligence on the part of the defendant city.[273]

[270] Romano v. Birmingham Ry., etc., Co., 180 Ala. 335; 62 So. 677; 46 L. R. A. (N. S.) 642.

In some states statutes require gas or oil companies to retain their products in safe receptacles, and provide that the companies shall be liable for the consequences of its escape. In such instances in an action for damages it is not necessary to aver it was practicable to maintain the gas or oil on the defendant's premises. Rock Oil Co. v. Brumbaugh, 59 Ind. App. 640; 108 N. E. 260.

[271] George v. Tristate Gas Co., 74 W. Va. 177; 81 S. E. 722.

[272] See Sec. 691, note 48. City Gas Co. v. Webb, 117 Va. 269; 84 S. E. 645.

[273] Collier v. Hamilton, 32 Ont. L. Rep. 214. See generally Karabelas v. Canadian Western Nat. Gas Co., 16 D. L. R. (Ont.) 791; 28 Wk. R. (Ont.) 669.

§ 749. Escape of poisonous liquid onto ground.

A city in the conduct of a gas plant may be liable for the negligent escape of a poisonous liquid from its premises, where a person or property is injured thereby. Thus where a city operating a gas plant permitted a combination of calcium carbide and water, and other poisonous and corrosive products to escape from its plant and run into an open ditch extending along the street; and a seven-year-old boy walking along the street near the edge of the sidewalk was splashed by the liquid by reason of another boy throwing a stone into the ditch, thereby producing an injury to him, it was held that there was such a showing of facts as to render the complaint sufficient. It was also held that it was a question of fact whether the defendant's negligence was the approximate cause of the injury; and that the complaint was not subject to demur on the ground that the injury was attributable to the act of an independent agency of which the defendant had no control.[274]

§ 750. Destruction of automobile by explosion of its gasoline.

A traveler hired an automobile to go on a journey, and an accident befell it whereby it was, after night, thrown into a ditch. The servant of the traveler approached it with an open globe lantern after the machine had been ditched, and when a strong odor of gasoline was quite perceptible. The gasoline was exploded, destroying the automobile. There was no other light near the pan of the wrecked automobile; and this was held sufficient to warrant the conclusion that the lighted lantern caused the fire. It was also held to be a question for the jury whether the servant exercised due care in approaching the automobile with an open globe lantern when there appeared a strong odor of gasoline about it.[275]

[274] Mayor v. Felder (Ga.), 89 S. E. 423; Whiteman v. McNamare Tobacco Co. (Ky.), 66 S. W. 609; 23 Ky. Law Rep. 2120 (a ditch of hot water in a street into which one boy jostled another); Natural Gas Co. v. Hicks, 134 Ky. 12; 119 S. W. 166; 23 L. R. A. (N. S.) 249; 135 Am. St. 407.

[275] Brown v. Freeman, 84 N. J. L. 360; 86 Atl. 384.

§ 751. Explosion of a lighting plant defectively installed.

A retail dealer sold a lighting plant, and its manufacturer sent its agent to install it. This agent left the carburetor and connecting pipes leading into the dwelling uncovered, and assured the purchaser that the failure to cover them did not preclude their use. Due to the heat of a hot day and the exposed condition of the pipe and carburetor the gasoline exploded and killed the purchaser. It was held that the manufacturer and not the retail dealer was liable. The question of contributory negligence of the purchaser was left to the jury.[276]

§ 752. Oil stains on clothes burning.

If a manufacturer of an oil compound to remove stains on clothing use dangerous material in its preparation rendering it liable to ignition when brought near to a flame of fire, he will be liable to anyone burned by the clothing taking fire when it is brought near such a flame. And if the immediate vendor to the injured person procure the compound from another or the manufacturer he will be liable if he represents himself as the manufacturer, even if he has no notice of its dangerous character. In such a case actual knowledge of its dangerous character on the part of the maker is not required to make him liable, if the article is inherently dangerous.[277]

[276] Mahlstedt v. Ideal Lighting Co., 271 Ill. 154; 110 N. E. 795; affirming 193 Ill. App. 91. In this case the booklet issued by the company was held admissible, the purchaser having read it, on the ground that it tended to the belief that precaution was unnecessary.

The seller of a gasoline engine is liable for injuries sustained by a purchaser of it as the result of emission of dangerous fumes from the exhaust of the engine installed by the vendor in a building without covering the exhaust pipe to the open air, the necessity of which was known to him, and who gives no warning to the purchaser of the danger therefrom, notwithstanding it is explained by a book sent with the engine, but which the purchaser did not see. Tollington & Co. v. Jones, 4 D. L. (Ont.) 648; 21 Wk. L. R. 168.

[277] Thornhill v. Carpenter Morton Co., 220 Mass. 593; 108 N. E. 474.

In this case the plaintiff's husband ignited a match and brought it near her dress that had been cleaned with the oil compound, and which she had on; whereupon it took fire and burned her badly. Her own and her husband's contributing negligence was left to the jury.

CHAPTER XXX.

INJURIES CAUSED BY OIL AND GAS—NEGLIGENCE.

§ 753. Scope of chapter.
§ 754. Fire on railroad communicating with refinery.
§ 755. Neglect in not providing stop-cock.—Injury to servant.
§ 756. Injuries from shooting wells.
§ 757. Oil escaping into sewers.
§ 758. Injury occasioned by exploding gasoline fire-pot.
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§ 760. Negligent care of grounds.—Fire communicating to adjoining houses.
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§ 762. Rescuer injured by negligence of an oil or gas company.
§ 763. Minor employee's oil-soaked clothes catching fire.
§ 764. Explosion of benzine used in paint.
§ 765. Servant of oil company injured by defective appliances.
§ 766. Injuries to servant of purchaser.—Sale in violation of statute.
§ 767. Sale of oil of low fire test, explosion.—Deception.
§ 768. Implied warranty in sale of illuminating oil.
§ 769. Gas box in sidewalk.
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§ 771. Streets rendered dangerous by laying gas mains.
§ 772. Imperfectly constructed gas building.
§ 773. Exploding tank injuring servant.
§ 774. Servant entitled to safe place in which to work.
§ 775. Servant injured by use of defective ladder.
§ 776. Kindling fire with oil.
§ 777. Drawing gasoline near furnace fire.
§ 778. Gasoline plant, out of doors, exploding.
§ 779. Escaping oil or gas injuring land.

§ 753. Scope of chapter.

It is not the intention to repeat in this chapter what has been discussed in other chapters and under heads more appropriate. Nor can there be any systematic arrangement of the contents of this chapter—the aim being to gather up such decisions as pertain to injuries that have been caused by oil or gas, or by negligent conduct in the operation of gas works or pipe lines, or in the operation of oil leases. Under the head of Leaks and

Explosions will be found a discussion of negligence in connection therewith.

§ 754. Fire on railroad communicating with refinery.

A railway company left standing on its switch a car used in carrying tar. A passing locomotive set fire to it, and the fire communicated to an oil tank thirty-six feet away, which was a part of the plaintiff's oil refinery. The fire then communicated with the refinery and it was destroyed. The company was held liable, and in passing on the case the court used the following language: "While this is perhaps a close case upon its face, we are of the opinion that the judgment must be affirmed. It could not have been withdrawn from the jury, nor are we able to see any error in the manner of its submission. The learned judge could not have ruled, as a question of law, that the plaintiff was guilty of contributory negligence in erecting his oil tank where he did. The sparks from the locomotive were not likely to set fire to oil in the tank, nor did they do so in this case. The accident would not probably have occurred, had not the defendant company permitted a car, used for carrying tar, to stand on the track opposite to, and near, plaintiff's oil tank. This car caught fire from the sparks of the engine, and was wholly or partly consumed. It was the fire from this car which ignited the oil and caused the destruction of plaintiff's works. The accident could have been avoided by running the car a short distance away after it had taken fire. This was eminently a jury case." [1]

§ 755. Neglect in not providing stop-cock.— Injury to servant.

An oil company must provide the usual means to prevent injuries in case of an accident, so that the flow of the oil may be controlled, especially where it is used in connection with fires. We take the following statement from an Illinois case, where a

[1] Confers v. New York, etc., R. R. Co., 146 Pa. St. 31; 23 Atl. Rep. 202.

company using large quantities of oil was held liable: "This was an action on the case by appellee against appellant, to recover for personal injury alleged to have been received through the negligence of appellant. For several years before the accident, appellant had been engaged in burning brick, and appellee worked as its servant in that business. In 1887, appellant commenced burning brick with crude oil for fuel, and appellee, before his injury, had assisted in burning several kilns of brick by the new method. In May, 1888, shortly after the kiln was fired, the injury occurred. The kiln being burned was 70 or 80 feet long and about 30 feet wide; there were 18 or 20 arches running through from side to side. Around the kiln, a little way from it, near the ground, two pipes were laid side by side, each about two inches in diameter. One of these pipes carried steam, and the other oil for fuel. Opposite the end of each arch, two short pipes, three-fourths of an inch in diameter, extended towards the arch, one connected with the oil pipe, and the other the steam pipe. The short pipe was about two feet and a half long; the small oil pipe perhaps a foot long. On the end of the steam pipe, at each arch, was placed what was known as the "burner." In the small oil pipes there was a check valve or stop-cock, near the main oil pipe, and the connection was made between this pipe and the burner by a rubber tube connecting the short pipe with the burner. The purpose for which the rubber was used was to permit expansion and contraction of the small steam pipe; in other words, so as to make the pipe containing the oil flexible. The burner was by this means extended, not into, but as near, the arch as possible, and the oil injected into the arch by the action of the steam through the burner. On a side track, 20 feet or more away from the kiln, common railroad oil tanks were run on their trucks, and the oil carried therefrom by means of a two-inch pipe, and emptied into the oil pipe surrounding the kiln. Prior to the time of the accident, but one tank had been used at a time, and the supply pipe from the tank was fitted with a check valve near its entrance into the feed pipe, or the pipe encircling the kiln. Each of the small pipes extending from the steam and feed pipes were sup-

plied with a stop-cock near the feed pipe, so that both steam and oil could be shut off from any individual burner. There was also a check valve on the tank, by closing which the flow of oil from the tank could be shut off. This valve was so arranged that it could not be turned by hand, but necessarily required the use of a wrench or tongs. In the afternoon before the accident, the kiln being in condition to fire, Williams, the kiln foreman, was ordered by appellant, through its superintendent, to cut the feed pipe in the middle of the kiln on each side and stop the ends, which was done. Prior to this, there had been in use what was known as the Brown burner. They were directed to attach the Brown burner to one-half of the feed pipe, or the pipe encircling one-half of the kiln, which appellee and the gang of men with him, under the direction of the steamfitter of appellant, did. By the cutting of the oil pipe, the circulation of oil around the kiln was impossible, and, to supply the other end, another tank was run upon the side track, and attached, by a new supply pipe, with the other half of the feed pipe, so as to furnish oil to run the other burners to be thereto attached. The purpose was to test the relative merits of the Brown burner, and another called the Cannon burner, to see which would consume the greater amount of oil in producing the requisite continued heat. The attachment between the additional tank and the pipe surrounding the half of the kiln at which the Cannon burners were to be tested, including putting on the burners, was made by 'Mr. Cannon and his men,' possibly assisted by Mr. Williams, kiln foreman, and perhaps other fellow workmen about the kiln. Cannon had been a gasfitter, was familiar with the work, but neither he nor the men under him were in the employ of appellant. In making connection between the tank and the feed pipe encircling the half of the kiln at which the Cannon burners were put, no stop-cock or valve was put in where the supply pipe from the tank joined the feed pipe, so that the oil running to the Cannon burners could be shut off only at two points — at the tank, and at the small stop-cocks where the small burner pipes joined the feed pipe. At the other end, the supply pipe formerly in use was put in, which was supplied with the

check valve near the feed pipe. This arrangement of the pipe to which the Cannon burners were attached was made by Cannon, and, as before said, possibly with the knowledge of the foreman; but appellee, not the gang of men with whom he worked, had no notice that the stop-cock at the joining of the supply and feed pipes had been omitted. The rubber pipe leading to the burner, from the heat and action of the oil, was soon destroyed, and would break or crack off, permitting the oil to escape, and the oil, being highly inflammable, would catch fire from the heat of the arch, and prevent the close of the small check valve in the pipe leading to the burner; and in such case the stop-cock at the junction of the supply and feed pipes had always been used, and, by shutting off the oil there, a conflagration was prevented. This condition of things was known to appellant, and it had supplied rubber tubing in considerable quantities to take the place of such as might be destroyed in that way. It is shown that the breaking of the rubber and escape of the oil was frequent, the rubber lasting sometimes during the burning of a kiln and sometimes not. The kiln was fired in the evening. Appellee and the gang of men under him were in charge of the end of the kiln to which the oil or Brown burners were fixed, and Williams and another shift of men in charge of the other end, until about 12 o'clock midnight, when Williams and his gang retired, and appellee and two helpers took charge of the entire kiln. About 4 o'clock in the morning appellee was on a ladder at the side of the kiln, observing the top, when a rubber hose, connecting with one of the Cannon burners burst, and the oil immediately took fire, and, extending, so covered the small stop-cock that it was impossible to close it. He ran immediately to the place where the supply pipe joined the feed pipe, expecting to find the stop-cock, where it had always previously been found, but found none. He called to the other employees, and went himself about 200 feet, and turned in the fire alarm, and immediately returned to the end of the kiln where the fire was spreading. The fire was spreading rapidly, was very hot, and, fearing an explosion of the oil in the tank, appellee determined to disconnect the tank from the supply pipe, and get it away from the fire. For this purpose he directed one of the men to shut off the tank; that is, to close the

valve between the tank and the supply pipe. One of the men went on to the tank for that purpose, and again got off. Appellee inquired if the valve had been closed, and one of the men replied that it had. He again inquired, and, upon being assured that it had been closed, he went under the tank, disconnected the feed pipe from the tank, when the oil from the tank flowed over him, and saturated his clothing, which instantly caught fire from the burning oil spreading from the feed pipe. Appellee was seriously injured. It appears that the man who went upon the tank to close the valve endeavored to do so with his hands. Finding that impossible, he ran to get a wrench; but upon his return the flames were sweeping over the tank, and drove him away. The negligence charged in the declaration, in the first count, was the neglect of appellant to furnish proper and safe connections between the tank and the brick kiln, and that appellant negligently and improperly provided and used a connection made of rubber, which was unsuitable and improper for such purposes; that the rubber became heated and cracked and broke, permitted the oil to escape, which took fire, etc. The second count alleged the use of crude oil was dangerous and hazardous; that plaintiff was in appellant's employ as assistant to the foreman, and his employment necessarily brought him near to the tanks, kilns, etc., and it became and was the duty of appellant to exercise a high degree of care and diligence in providing proper and safe appliances around the brick kiln and oil tank, and proper connections, etc., and also to provide a safety check, or some suitable device, to stop the flow of oil in case of accident, etc., so as to insure the safety of its employees; yet appellant did not do so, but carelessly, negligently, and improperly provided a connection made of rubber, which, on becoming heated, vulcanized and broke, and the oil thereby escaped, and, not having provided suitable and proper appliances by which the flow of the oil could be checked, the flames from the kiln communicated with the oil, resulting, etc." [2]

[2] Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285; 18 L. R. A. 215; Watson v. Kentucky, etc., R. Co., 137 Ky. 619;

§ 756. Injuries from shooting wells.

Under proper circumstances and at proper times it is not unlawful to shoot a well so as to increase the flow of gas or oil; but to shoot a well in a densely settled community, as in a city, is so dangerous an undertaking that a court of equity will enjoin it.[3] A well may be shot so carelessly or at so improper a time as to render those shooting it liable for damages incurred by the act of shooting it. Thus where a company engaged in the business of shooting wells with powerful explosives, was employed to shoot a well in a village, and its practice was to carefully lower the explosive to the bottom of the well, and then explode it by dropping into the well a weight called a "go-devil;" and the shooting company claimed that its agent instructed the owner of the well not to drop the "go-devil" until morning arrived, and that he disobeyed the instruction and let it drop at 7:30 in the evening; and it appeared because of the season (it was September) fires and lights were burning when the well was shot; and it was well known that when a well was shot large quantities of gas would escape from the well and settle close to the earth under certain conditions of the atmosphere, and explode if it came in contact with fire; and it was shown that an engine near the well had a fire in it; and when the well was shot gas escaped, exploded and injured a boy permanently, the shooting company was held liable, and could not shift the liability upon the owner of the well; for it was hired to shoot the well, and the owner in dropping the "go-devil" was simply acting for and in their place and stead.[4] In this case it was held proper to ask a witness, who knew the prevailing custom of well

126 S. W. Rep. 146; 129 S. W. 341. Defective gate valve for gas. United States Nat. Gas Co. v. Hicks, 134 Ky. 12; 119 S. W. Rep. 166; Standard Oil Co. v. Wakefield, 102 Va. 824; 47 S. E. Rep. 830.

[3] People's Gas Co. v. Tyner, 131 Ind. 277; 31 N. E. Rep. 59; 16 L. R. A. 443; Hill v. Schneider, 43 N. Y. Supp. 1; 13 N. Y. App. Div. 299; 4 N. Y. Ann. Cas. 70.

[4] Ohio, etc., Co. v. Fishburn, 61 Ohio St. 608; 56 N. E. Rep. 457.

shooters, if 100 quarts of nitroglycerine were lowered into a well, the well "logged" on, the derrick boarded up except an opening facing the engine and belt house, the well situated 80 to 200 feet from residences surrounding it, the village containing 1,200 inhabitants, and the condition of the atmosphere was such that when the gas was liberated it would settle near the earth—if it would be a proper time to shoot the well at 7:30 in the evening of September 7, when darkness had intervened and fires and lights were lit in residences and business houses. It was said that the fact called for was not an ultimate fact in issue, was not a subject of common knowledge, nor one that the jury could as well judge as the witness. As the expert knew all the dangers incident to the explosion, at the place and hour and in the surroundings, it was considered that his opinion would aid the jury in drawing a conclusion, better than they could draw from the facts proven.[4a]

§ 757. Oil escaping into sewers.

It is the duty of an oil company to keep its oil on its own premises, and if it permit it to escape, and thereby another is injured, it will be liable. The liability does not seem to rise out of any negligent act; but out of a duty of the company to keep on its own premises an agency that may work an injury to another, or at least in all likelihood will do so. Thus where petroleum escaped from an oil tank, percolated through the soil to a sewer in which gases formed from the oil, and found their way into a bakery and so contaminated the air as to injure the products manufactured by the baker, it was held that the company permitting the oil to escape was liable. The fact of the sewer conveying the gases to the bakery, and that they would

[4a] In selling and delivering gasoline a company must use ordinary care in transferring it. This is true if it is delivering it into a tank connected with a private lighting system. If it fails to do so, it will be liable for any injury which is the direct result of such lack of care. Waters-Pierce Oil Co., v. Knisel, 79 Ark. 608; 96 S. W. Rep. 342; Waters-Pierce Oil Co. v. Parker (Ark.), 96 S. W. Rep. 353; Waters-Pierce Oil Co. v. Burrows, 77 Ark. 74; 96 S. W. 336.

See where the lessee was held liable to the lessor for damages done the property by negligence of an independent contractor in drilling a well. Minnetonka Oil Co. v. Haviland (Okl.), 155 Pac. 217.

not have reached the bakery but for it, was considered not to make the negligence of the owner of the oil remote, for the reason that the sewer was a condition rather than a cause, not an independent cause of the injury making it the proximate cause.[5] If, however, the escape of the oil is unavoidable, then the oil company will not be liable for its escape and the injury it inflicts. Thus where oil was properly stored, but a fire broke out on the premises without the neglect of the company, and the oil escaped to adjoining premises, from which it was drained by a ditch dug pursuant to the orders of the fire chief of the city into a sewer, no person or officer of the oil company giving any direction concerning the digging of the ditch or as to the turning of the oil into it; and the petroleum generated gases in the sewer, which exploded, resulting in a death, it was held that the oil company was not, but the city was, liable.[6]

§ 758. Injury occasioned by exploding gasoline fire-pot.

A tinner was employed to put on a part of a building a tin roof, while upon the remaining part a shingle roof was being put on, by another contractor. In doing so he used a gasoline fire-pot to heat his soldering iron. The wind was blowing, and to prevent it blowing the fire the tinner's servant set up some shingles on both sides of the fire-pot; but they catching afire, he set up some tin. The tin so reflected the heat of the fire as to raise the temperature of the gasoline in the tank of the fire-pot that it exploded, and injured a servant of the person putting on the shingle roof. The tinner's servant knew that gasoline would explode when heated sufficiently. It was held that the tinner was liable to the servant of the contractor putting on the shingle roof.[7]

[5] Brady v. Detroit, etc., Co., 102 Mich. 277; 60 N. W. Rep. 687; 26 L. R. A. 175.

[6] Fuchs v. St. Louis, 133 Mo. 168; 31 S. W. Rep. 115; 34 S. W. Rep. 508; 34 L. R. A. 118.

The owner of dangerous oil must keep it under control. Langebough v. Anderson, 22 Ohio Cir. Ct. Rep. 178; 12 Ohio C. D. 341.

[7] Evans v. Hoggatt, 9 Kan. App. 540; 59 Pac. Rep. 381.

When a cylinder charged with carbon dioxide very unexpectedly exploded; and such explosion was very unusual, the owner was held not liable, although he had made no test of the cylinders except that when they were filled they were subject to a test much greater than

§ 759. Use of false brands.—Explosion.

If oil be falsely branded, to render the oil company liable for damages occasioned by it exploding, the deception must in some way have led to or be connected with the injury. Thus where 74 degrees gasoline was marked "puroline," and both oils were manufactured from petroleum, and both as the evidence showed, were equally dangerous, the deception was held not to be such as to render the oil company liable for an explosion, which would have occurred even if that grade of gasoline had actually been furnished.[8] If a dealer in oil negligently or unknowingly mixes with it gasoline and then sells it as oil of a pure and standard grade, without notice to the purchaser, the sale is an act of negligence for which he will be liable in damages resulting to the purchaser; and if the purchaser retail it to a vendee who is injured, the first vendor will be liable.[8a] So it is an act of negligence to deliver gasoline upon an order for kerosene.[8b] If the purchaser has notice that the oil he purchases is gasoline, then he is chargeable with notice of its dangerous character, and must govern himself accordingly.[8c] Where a refining company delivered to a storekeeper gasoline as kerosene, and the substance sold contained both gasoline and kerosene; and a customer of the

continued afterwards, there being no general usage or custom as to testing them. Kilbridge v. Carbon, etc., Co., 201 Pa. 552; 51 Atl. Rep. 347.

A dealer in building materials is not liable for damages occasioned by a fire originating from some unknown cause in the basement of his store where he kept oils, paints, varnishes and cotton. Cook v. Anderson, 85 Ala. 99; 4 So. Rep. 713.

[8] Socala v. Chess Carley Co., 39 La. Ann. 344; 1 So. Rep. 824. In this case the servants of the plaintiff were guilty of negligence in drawing the oil at night and using a lighted lantern to aid them in seeing how to work.

Action given by statute. National Oil Co. v. Ramkin, 68 Kan. 679; 75 Pac. Rep. 1013; Peterson v. Standard Oil Co., 55 Or. 511; 106 Pac. Rep. 337.

[8a] Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107; 89 Pac. Rep. 212; Wilkins v. Standard Oil Co., 74 N. J. L. 151; 64 Atl. Rep. 985; Pfarr v. Standard Oil Co. (Iowa), 157 N. W. 132; Reed v. Nelson, 133 La. 968; 53 So. 484. But the fact that the wholesaler knew the retailer had kerosene customers will not render him liable, if he told the retailer that he was getting gasoline. Morples v. Standard Oil Co., 71 N. J. L. 352; 59 Atl. Rep. 32.

[8b] Atkiss v. New Staunton Coal Co., 147 Ill. App. 241; DuBois v. Luthmer, 147 Iowa 315; 126 N. W. Rep. 147.

[8c] Conrad v. J. W. Graham & Co., 54 Wash. 641; 103 Pac. Rep. 1122.

Where it was charged that the defendant sold gasoline to the plaintiff for kerosene, with the malicious intent to injure him, neglecting to inform him it was kerosene, it was held that it was a charge of intentional injury. Morrison v. Lee (N. D.), 102 N. W. Rep. 223.

storekeeper bought some of the oil, which exploded in starting a fire, it was held that the refiner was liable to such customer, even though he, the refiner, was ignorant of its noxious character, if, in the exercise of ordinary prudence, the refiner or its servants could have procured such knowledge. The degree of care used by the agent of the refiner when making the sale to ascertain whether the oil sold was gasoline or kerosene was held to be a question for the jury.[8d]

§ 760. Negligent care of grounds.—Fire communicating to adjoining houses.

An oil company must keep its premises in such a condition that it will not be liable to lightly or easily catch fire, and thereby endanger properties near it. Thus where an oil com-

If, in consequence of his intoxication, plaintiff was prevented from using his senses, and was on that account injured by the explosion of a lamp filled with a flashlight chemical sold him by defendant, he could not recover, though the chemical was of a more dangerous kind than that ordered, and defendant was negligent in selling it. Conrad v. John W. Graham & Co., 54 Wash. 641; 103 P. 1122.

Where it appeared that the plaintiff was an experienced man in photography with flashlight chemicals, knew that only magnesium could be used in his magazine lamp, and also that such package was usually labeled; and a messenger sent by him to the defendant for magnesium was given another kind of chemical, which, on being used by the plaintiff, exploded and injured him, it was held proper to charge the jury that if the defendant notified the messenger that the chemical furnished was not magnesium, but a more dangerous chemical, and such chemical was labeled, cautioning against its use in a magazine lamp, and if the plaintiff saw and read, or by exercising reasonable care could have seen and read such caution, but nevertheless used the chemical in his lamp, he could not recover. Conrad v. John W. Graham & Co., *supra*.

A complaint, alleging that F., a merchant, ordered of defendant a certain kind of kerosene that would stand an open-fire test of 120 degrees; that defendant negligently delivered to him, in a tank marked as containing the article ordered, a distillate that would only stand a test of 88 degrees; that F., relying on his contract and the label, sold some of it to plaintiff's intestate, as the article ordered; that she, while trying to kindle a fire with it, without negligence, was killed by an explosion which resulted; and that, had it been as represented, no explosion would have resulted—is sufficient, at least as against a general demurrer, without any allegation of the dangerous character of such distillate. Peterson v. Standard Oil Co., 55 Or. 511; 106 Pac. Rep. 337.

In an action for injuries to a child due to an explosion of gasoline alleged to have been negligently delivered to her for kerosene in a can not intended for gasoline, where it was shown that on the morning after the accident children of the family to which she belonged were seen in possession of a gasoline can properly painted and labeled, their declarations as to what they were going to do with it were admissible as verbal acts explanatory thereof. DuBois v. Luthmer, 147 Iowa 315; 126 N. W. 147.

It was also held that it was proper to show that on the morning after the accident the children of the family to which she belonged were seen in possession of a gasoline

pany permitted its buildings and grounds to become soaked with oil, and also allowed a large number of "jackets" used on oil cans and barrels to accumulate on the premises, so that a passing locomotive easily set them on fire, and the fire reached adjoining buildings and destroyed them, the oil company was held liable, for the reason that if it had kept its premises and buildings in a proper condition the fire would not have been started, and if started could have been controlled. In this case the plaintiff's buildings that were burned had been built after he knew of the condition of the oil company's premises and buildings; but this was held to make no difference.[9] Nor would it have made any difference if the plaintiff had previously sold the grounds to the company to

can properly painted and labeled, as well as what its mother said ten minutes after the explosion concerning how the accident occurred. DuBois v. Luthmer, *supra*.

The retailer may hold the wholesaler liable where he has had a judgment rendered against him (the retailer) in favor of his (the retailer's) customer by reason of an explosion occasioned by the mixed oils. Pfarr v. Standard Oil Co. (Iowa), 157 N. W. 132. The burden is on the plaintiff to show that the kerosene contained gasoline when delivered to him by his vendor. *Ibid.*

Through the negligence of defendant's driver, gasoline and coal mixed were delivered to a grocer in place of pure coal oil. The grocer discovered that some of the coal oil was mixed with gasoline, but from tests of smell and evaporation decided that two of the cans filled were free from gasoline. He notified defendant, and the driver agreed to remove the oil on the following business day. In the meantime, the grocer disposed of a can, which he believed was pure coal oil, to deceased. In filling a lamp, the oil exploded and deceased was killed. Held, that while, in the case of inflammable oils and poisons, the vendor who misbranded them is liable, though they pass through a number of hands, defendant was not liable for the negligence of the grocer, who was familiar with the danger of gasoline, in disposing of the oil as coal oil though he knew some of that delivered was mixed with gasoline, was an intervening cause which defendant could not be charged with anticipating. Catlin v. Union Oil Co. (Cal.), 161 Pac. Rep. 28.

[8d] McLawson v. Paragon Refining Co. (Mich.), 164 N. W. 668; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Anderson v. Standard Oil Co. (Ia.), 164 N. W. 169.

[9] Waters-Pierce Oil Co. v. King, 6 Tex. Civ. App. 93; 24 S. W. Rep. 700; Moeckel v. C. A. Cross & Co., 190 Mass. 280; 76 N. E. Rep. 447.

use in their oil business.[10] In such an instance, the general practice and custom of oil companies is admissible to rebut the charge of negligence, but evidence of the practice and custom of a particular company is not.[11]

§ 761. Oil escaping from an exploding refinery.

Where oil escaped from a refinery because of an explosion, and flowed down a pipe line to a lighter in a harbor, used for the conveyance of oil, set it on fire, causing it also to explode, and by reason of it exploding a vessel moored in the harbor was set on fire, the refining company was held not liable for the loss of the vessel; for the reason that it was not shown that the refinery company was negligent in the operation of its works nor the explosion caused by negligence. The mere fact of the explosion was held not to show negligence, for the reason "That there is a general disposition among men to preserve their property and escape liability, and ordinarily their motives will secure that degree of care and caution which the safety of the public demands; hence the presumption of duty performed which in cases of fire will protect him until the facts be proven from which negligence can be inferred."[12] But this rule has not always been accepted, some of the courts holding that the fact of an explosion raises a presumption of negligence.[13] Where oil escaped from a refinery and reached water in a harbor; and it was set on fire by a person throwing a lighted match into the water, and the fire burned a boat, the refinery company was held not liable, the escape not being the proximate cause of the loss.[14]

As to case of malicious burning, see Watson v. Kentucky, etc., Co., 137 Ky. 619; 129 S. W. Rep. 341; modifying 126 S. W. Rep. 146.

[10] Judson v. Giant Powder Co., 107 Cal. 549; 40 Pac. Rep. 1020; 29 L. R. A. 718.

[11] Standard Oil Co. v. Swan, 89 Tenn. 434; 14 S. W. Rep. 928; 15 S. W. Rep. 1068; 10 L. R. A. 366.

Employee in restaurant throwing out flaming gasoline lamp that exploded, burning the plaintiff. See Donahue v. Kelly, 181 Pa. St. 93; 37 Atl. Rep. 186; 59 Am. St. Rep. 632.

[12] Cosulich v. Standard Oil Co., 122 N. Y. 118; 25 N. E. Rep. 259.

[13] Warn v. Davis Oil Co., 61 Fed. Rep. 631; Judson v. Giant Powder Co., 107 Cal. 549; 40 Pac. Rep. 1020; 29 L. R. A. 718.

[14] Neal v. Atlantic Refining Co, 4 Pa. Dist. Rep. 49.

§ 762. Rescuer injured by negligence of an oil or gas company.

To render an oil or gas company liable to one who has been injured in attempting to rescue one imperilled by a fire or an explosion, the company must have been guilty of negligence in some way that imperilled the person whom the injured person attempted to rescue. In such an instance the oil company must have been guilty of negligence toward the person who was in danger, or to the rescuer, in order to hold it liable.[15] But where a city dug a trench in the street, in which gases accumulated to such an extent that the workingmen abandoned it, leaving it open several days; and there was such an arrangement of timbers leading down into it as amounted practically to a ladder, down which a boy descended to secure his ball that had fallen into the ditch, the place where he descended being near a school playground in a populous part of the city, when he was overcome with the gas; and his playmate, seeing him fall back into the ditch as he was coming out, went to his rescue, not knowing of the gas, and lost his life in endeavoring to save his comrade, it was held that the city was liable for the death of the latter, being bound for the consequences of its neglect, though such consequences were not and could not by any ordinary prudence have been anticipated. The acts of the boy who went to the rescue of his playmate, it was held, must be considered in view of the circumstances that he had no time to think, but must act at once, and that others had gone into the ditch before and returned safely, and also that his playmate whom he went to rescue returned after recovering from the effects of the gas, and above all that he went to the rescue of a human being in great and imminent danger. Consequently he was not chargeable with errors of judgment resulting from the excitement of the moment.[16]

[15] Jackson v. Standard Oil Co., 98 Ga. 749; 26 S. E. Rep. 60; Donahue v. Wabash, etc., Co., 83 Mo. 560; Pennsylvania Co. v. Langendorf, 48 Ohio St. 316; 28 N. E. Rep. 172; 13 L. R. A. 190.

[16] Corbin v. Philadelphia, 195 Pa. St. 461; 45 Atl. Rep. 1070; 49 L. R. A. 715. For analogous cases, see Maryland Steel Co. v. Moorney, 88 Md. 482; 42 Atl. Rep. 60; 42 L. R. A. 842; Peyton v. Texas & Pacific Ry., 41 La. Ann. 861; 6 So. Rep. 690; Gibney v. State, 137 N. Y. 1; 33 N. E. Rep. 142; 19 L. R. A. 365.

§ 763. Minor employee's oil-soaked clothes catching fire.

A boy was working for an oil company, and his clothing became soaked with oil. It was a cold day, and becoming chilled he was directed by the superintendent in charge of the place to go to an upper room of the building the company was using and warm himself at the stove in the room. He was not warned that his clothing was liable to take fire if he got close to the stove. He went up into the room and approached close to the stove, which was quite hot, when his clothing took fire. He tried to escape from the room, but the door having become fastened by reason of the lock being defective, he jumped out of an upper window and received injuries from which he died. The oil company was held liable, because it was the superintendent's duty to warn the boy of the danger of getting close to the stove when his clothes were in their oil soaked condition.[17]

§ 764. Explosion of benzine used in paint.

A master painter sent his servant to paint the inside of a water tank, which was ten feet in diameter and twelve feet deep. He furnished the servant paint that had been in common use twelve years; and the master did not know the paint was dangerous. It was supposed that the paint contained a certain amount of benzine; and when the cans were opened and the paint applied to the sides of the tank it threw off some gas which, coming in contact with a light necessarily used, caused an explosion and injured the servant. The master was held not liable, on the ground that he had provided such material and implements as were ordinarily used by persons in the same business, and he was required to do nothing more. He was not required to secure the best known material, or subject the material he used to a chemical analysis in order to discover a possible or remote hazard incurred by their use.[18]

[17] Wallace v. Standard Oil Co., 66 Fed. Rep. 260.

[18] Allison Manufacturing Co. v. McCormick, 118 Pa. St. 519; 12 Atl. Rep. 273.

It is not negligence in a master to use gasoline in the extermination of vermin. The fact that the gasoline exploded does not show that the master was negligent in directing the servant to so use it. Allegheny Imp. Co. v. Weir, 96 Ark. 500; 132 S. W. 462.

§ 765. Servant of oil company injured by defective appliances.

Where a servant of an oil company was injured by a defective still in the refinery, the refining company was held liable. In this case the still was built by an independent contractor according to the plans of the president of the company, and by him placed in the refinery of the company. "If I employ a well known and reputable machinist," said the court, "to construct a steam engine and it blows up from bad materials or unskilled work, I am not responsible for any injury which may result, whether to my servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of construction. The machinist then becomes my servant, and respondent superior is the rule." [19] A servant descended with a light into an oil still to repair it, and gas exploding, he was killed. His employer was a distiller of crude petroleum, and used the tank for that purpose. In the distilling of the oil large quantities of gas were generated, which escaped into a running room when the stills were in operation; but when the stills were empty, some of the gas which escaped from the pipes into the running room found its way back into the stills, because no stop-cocks had been put in the pipes to shut it off. It was necessary for the employee to have the light when he went into the still to repair it. The oil refining company was held liable on the ground that it had not furnished safe appliances and a safe place in which to work.[20] A refinery employed a servant to manufacture varnish, in which naphtha was used, by a process known only to himself. He was injured by an explosion. He claimed that the company was liable because the appliances and structure for the manufacture of the varnish were defective, that the place where he worked was unsafe, because near a furnace, to the fire of which the fumes or gas of the naphtha

[19] Ardesco Oil Co. v. Gilson, 63 Pa. St. 146.

[20] Nicholas v. Brush, 53 Hun 137; 6 N. Y. Supp. 601. In this case it was held that the defective condition of the appliances could be shown by a conversation which another and former employee had with the superintendent of the refinery.

could reach, as it did when he was injured, of which defects the company had notice. It appeared that the servant had designed the appliances, and there were doors which could be closed so the gases from the naphtha could not reach the furnace fire, which was in an adjoining room. The servant had full charge of the work, was skilled in his art, while the defendant had been owner of the plant only a week. The servant had been in the service of the former owner of the plant many months. The defendant was held not liable.[21] So where a servant, who had been at the same work over a year, went into a still with a light, knowing the danger of an explosion of the gas by reason of its coming in contact with the lighted candle he was carrying, and was injured by an explosion, it was held that the employer was not liable.[22] Where an employee of a city was killed, when in a cistern belonging to a city by an explosion of gas that had escaped from the mains of a gas company, and the explosion was occasioned by another employee of the city striking a match to light a cigar, the city was held liable, on the ground that it had not furnished a safe place in which the injured employee was put to work.[22a]

§ 766. Injuries to servant of purchaser.—Sale in violation of statute.

It is the duty of a vendor of a dangerous article to give notice of its dangerous qualities to the person to whom he sells it; and if he do not, and an injury to such person is occasioned by it, which is the natural and probable consequence of the vendor's neglect, such vendor is liable. And if the sale has been made by an agent of the vendor, and such agent is ignorant of the dangerous character of the article, and sells it to a purchaser without warning, the vendor will still be liable. The pur-

[21] Hauk v. Standard Oil Co., 38 N. Y. App. Div. 621; 56 N. Y. Supp. 273.

[22] Benfield v. Vacuum Oil Co., 75 Hun 209; 27 N. Y. Supp. 16.

The danger of an explosion from gasoline in the pumping pit of a city waterworks, of which an employee had no notice, is not one of the ordinary and obvious hazards of his employment, which he assumes by accepting it. Reed v. Syracuse, 83 Neb. 713; 120 N. W. Rep. 180.

[22a] Finson v. Topeka, 87 Kan. 87; 123 Pac. 720.

chaser's servant has the same right to recover, in case he is injured, as the purchaser possesses. Thus where the agent of a company sold 110 gallons of naphtha of the grade of 87 degrees, the most dangerous naphtha manufactured and sold, to a laundryman, and assisted him in storing it in a shed on the rear of the laundry premises, about thirty feet from where the furnace of the laundry was situated; and twice a day they drew ten gallons and took it into the laundry to heat the ironing machinery; and it was the duty of a boy and a foreman to remove the gasoline from the place of storage for use; and when they were doing this on a July day gas escaped from the storage tank, penetrated the atmosphere, entered the open door and window of the laundry building, came in contact with the furnace fire, exploded, and so injured the boy that he died, the oil company was held liable. No one knew of the dangerous qualities of the gasoline except the company, even its agent being ignorant of them, who innocently represented that there was no danger in storing the gasoline where it was put, upon which statements the purchaser relied. The court considered that the local agent had a right to make the representations he made, they coming within his apparent authority, and they were binding upon it, although authority to make them was not given him. The court refused to allow the oil company to show by a general agent that it was not the custom to make any representations concerning storage and the use of gasoline, in view of the fact that representations were actually made and the purchaser was not aware of the custom; and also in view of the fact that the law required a vendor of a dangerous article to notify the vendee of its dangerous qualities. The court also held that the proximate cause of the injury was the failure to give the purchaser notice of the dangerous qualities of 87 degree gasoline and the employment of an agent ignorant of such qualities. The court did not consider that the negligence of the company was remote by reason of the fact that the heat from the laundry may have generated the gas, because the oil was stored where the local agent of the company directed it to be placed, and also because the laundryman was induced to purchase it by reason of the representations of the local agent that it was safe, that he knew the use to which it was to be put, and the oil company must have known how it was to be used, for they shipped it

directly to the purchaser.[23] Where a statute provided that "no gasoline shall be sold, given away or delivered to any person in this State until the package, cask, barrel or vessel containing the same has been marked gasoline;" and a dealer sold gasoline in jug without marking it; and the minor child of the purchaser was injured by it, it was held that the vendor was liable. The court considered that the statute was for the protection of all persons in the State, the label or mark being required to warn them of the substance they were handling, so that the failure of the vendor to properly mark the package or cask was negligence *per se*. In this instance the girl, having no knowledge that the oil was gasoline, put a small quantity of it in the stove to light the fire, and on lighting it, it exploded, setting fire to her clothes. The father and the purchaser knew the jug contained gasoline, but did not tell her of it. His negligence was held not to be imputable to her.[24]

§ 767. Sale of oil of low fire test, explosion.—Deception.

A sale of oil of low fire test for illuminating purposes may render both the salesman and the manufacturer liable, in case of an explosion producing an injury; and so far as the manufacturer is concerned, it matters not how many dealers' hands through which it passes. "A manufacturer of oil," said the court in one case, who sells it as bearing a high and safe fire test, "when in fact he knows that its fire test will not exceed 64 to 65 degrees Fahrenheit, and that this is a most explosive and unsafe oil for domestic use, can plead nothing in a defense of this wilful, terrible wrong to a confiding community. He bears with him a heart regardless of social duty, evidencing malice in a legal sense in a high degree."[25] So where a manufacturer knowingly sold to a retail dealer naphtha oil for illuminating oil, and the retail dealer sold some of it to a consumer, and an explosion occurred when the consumer attempted to use it in a lamp, the manufacturer was held liable, the consumer not know-

[23] Waters-Pierce Oil Co. v. Davis, 24 Tex. Civ. App. 508; 60 S. W. Rep. 453.

[24] Ives v. Wilden, 114 Iowa 476, 87 N. W. Rep. 408; 54 L. R. A. 854.

[25] Elkins v. McKean, 79 Pa. St. 493.

ing the kind of oil it actually was.[26] Ignorance of the law requiring a test or whether the oil is below the test will not excuse the vendor.[27] The illegal intent will be presumed, and anything in rebuttal thereof is a proper matter for the defense.[28]

§ 768. Implied warranty in sale of illuminating oil.

In the sale of illuminating oil there is an implied warranty that it is fit for the purpose sold, and that it is not below the test required by law, where a statute requires a test to be made and fixes the standard. In a case of a sale of oil that was not up to the test required, and it exploded, causing the death of a person, it was held that not only the immediate salesman was liable, but also the refiner who put it on the market.[29] Where an oil dealer sold a grocer naphtha for kerosene, and the latter sold it to a consumer, who knowing not the contrary, in using it was injured by it exploding, it was held that the dealer was liable to the person injured.[30] A specification in a contract by the manufacturer of refined petroleum for its sale, to the effect that it shall be of a certain brand, color, and fire test, does not exclude an implied warranty that it shall be free from latent defects arising from the process of manufacture which would

[26] Wellington v. Downer Kerosene Co., 104 Mass. 64; Anderson v. Standard Oil Co. (Iowa), 167 N. W. 169 (gasoline and kerosene mixed, exploding); Ellis v. Republic Oil Co., 133 Iowa 11; 110 N. W. 20.

The absence of any contractual relation between an oil company and a private consumer does not relieve the company from liability for injury sustained by the latter in using, in the customary manner, a fluid which both he and his innocent vendor supposed was coal oil, but which the oil company, knowing that it contained gasoline, sold to such vendor as coal oil in violation of statute, and with the expectation that it would be retailed to the public for domestic use as such. Judgment (1907) 89 P. 212, 18 Okl. 107, affirmed. Waters-Pierce Oil Co. v. Deselms, 29 S. Ct. 270; 220 U. S. 270; 53 L. Ed. —; affirming 18 Okl. 107; 89 Pac. 212.

[27] Downing v. State, 66 Ga. 160; Horrigan v. Nowell, 110 Mass. 470; Chapman v. Pfarr, 153 Iowa 20; 132 N. W. 957; Schmidt v. Union Oil Co., 27 Cal. App. 366; 149 Pac. 1014.

[28] *Ibid.* A statute prohibiting the sale of naphtha does not prohibit the generation of gas from naphtha by a stationary gas engine. Anderson v. Savannah, 69 Ga. 472.

[29] Elkins v. McKean, 79 Pa. St. 493; Horrigan v. Nowell, 110 Mass. 470.

[30] Wellington v. Downer Kerosene Co., 104 Mass. 64.

render it unmerchantable.[31] A provision in such a contract that the acceptance of the petroleum by the buyers' inspectors shall be an acknowledgment that the goods are in accordance with the contract; and a certificate by the inspector to that effect, do not relieve the manufacturer from liability on an implied warranty that the petroleum is free from latent defects arising from the process of manufacture, which renders it unmerchantable.[32] Evidence that the defendant knew from the manner in which it was packed and from other sources the place to which it was to be sent by the plaintiff, who purchased the oil from him, was held admissible, in an action for breach of an implied warranty that it was free from latent defects which would render it unmerchantable.[33] Where a statute provided that if any inspector or deputy falsely branded or marked any barrel, or was guilty of any fraud or culpable negligence, in the discharge of his official duties, he should be liable to the party injured for all damages resulting therefrom, it was held that intentional wrong or culpable negligence was essential to render such inspector or his deputy civilly liable, and that there must be a casual connection between the false branding to render him liable for the injury and damages of which complaint is made.[34]

§ 769. Gas box in sidewalk.

A company empowered to manufacture, make and sell illuminating gas for a city or its streets, and any buildings, manufactories or houses therein, and to lay pipes in the streets for the purpose, is liable for an injury occasioned by a gas box in the sidewalk which furnishes access to a cock in the service

[31] Carleton v. Lombard, etc., Co., 149 N. Y. 137; 43 N. E. 422; rehearing denied, 149 N. Y. 35; 44 N. E. Rep. 183.

[32] Carleton v. Lombard, etc., Co., *supra*.

[33] Carleton v. Lombard, etc., Co., *supra*.

[34] Hatcher v. Dunn, 102 Iowa 411; 71 N. W. Rep. 343 (affirming on rehearing 66 N. W. Rep. 905); 36 L. R. A. 689. In this case it was also held that liability of the inspector and his sureties were purely statutory. It was also held that the fact that the oil was falsely branded would not render the inspector liable, if the injury resulted from some other cause, such as the use of a defective and an unsafe lamp.

pipe conducting the gas from the main to the house; for it is a part of the apparatus of the company over which it is bound to exercise proper care to prevent an injury to persons on the sidewalk.[35]

§ 770. Negligence of contractor.

A gas company had the proper authority to lay its gas mains in the streets of a municipality, and contracted with one C. to lay them. The contractor failed to properly refill the trench, and a horse fell into it and was injured. It was held that the owner of the horse could maintain his action against the gas company, on the ground that it was obliged to restore the streets to a safe condition; and that they could not escape liability by showing that they contracted with others to perform their duty for them.[36] And if a contractor building a sewer for the city injure the gas company's pipes, he will be liable to the company.[37] A contractor was to dig a trench in the street for a gas company under the supervision of the company's engineer. By a subcontract he passed the work to one Doris, who proceeded to dig the trench into which the plaintiff fell and broke his leg. Doris employed and supervised the hands who did the work, and the original contractor had no control over them. It was held that the original contractor was not liable.[38]

§ 771. Streets rendered dangerous by laying gas mains.

A gas company is liable to anyone injured by reason of its having torn up the streets of a city or town and not having taken sufficient precautions to protect the traveling public, the same as an individual; and it is no excuse that it has torn them up with the permission of the public authorities.[39] After the

[35] Washington Gaslight Co. v. District of Columbia, 161 U. S. 316; 16 Sup. Ct. Rep. 564; affirming 20 D. C. 39; Loan v. Boston, 106 Mass. 450.

[36] McCamus v. Citizens' Gaslight Co., 40 Barb. 380; Lebanon Light, etc., Co. v. Leap, 139 Ind. 443; 39 N. E. Rep. 57; 29 L. R. A. 342; Ellis v. Sheffield Gas, etc., Co., 2 Ell. and B. 757; 18 Jur. 146.

[37] *In re* Houghton, 20 Hun 395; Croft, etc., Gas Co. v. Pryor, 31 Gas J. 386.

[38] Wray v. Evans, 80 Pa. St. 102.

[39] Goodson v. Sunbury, etc., 75 L. T. Rep. 251; 60 J. P. 585; Scott v. Manchester, 2 H. and N. 204; 26

gas company has restored the streets to their former conditions as nearly as possible, it is not bound to keep them in repair thereafter.[40] A township in Pennsylvania is not liable for an explosion of gas in the highway escaping from a gas pipe, where there is no evidence that the township authorities ever knew there was a gas pipe in such highway.[41] Where a horse was frightened by reason of the noise caused by a well, and the wagon it was drawing came in contact with a long exposed gas pipe in the highway, occasioning an injury thereby to the plaintiff, the gas company owning it was held liable.[42] If a gas company so imperfectly fill up a trench in which it has laid its gas main that the filling subsides and leaves a hole in the street, it will be liable to anyone, without fault, falling into the hole and injured thereby, even though the work had been approved and accepted by local authorities. It is not only the duty of the company to put the street in as good condition as it was before, but also to exercise a careful foresight in order to prevent any injury, afterwards which might be occasioned to the work by storms and rainfalls, and which would render the work dangerous to travelers.[43] If the gas company open a hole in the sidewalk necessary to the prosecution of its work, it must see that it is properly protected.[44] As a matter of law it is negligence

L. J. Exch. 132, 406; 3 Jur. (N. S.) 590; 5 W. R. 598; Hornby v. Liverpool, etc., Gas Co., 47 J. P. 231; Whallen v. Citizens' Gaslight Co., 63 N. Y. Rep. 317; 30 N. Y. Supp. 1077; Pine Bluff, etc., Co. v. Derreuisseaux, 56 Ark. 132; 19 S. W. Rep. 428; San Antonio Gas Co. v. Singleton, 24 Tex. Civ. App. 341; 59 S. W. Rep. 920; Cressy v. South, etc., Gas Co., 94 L. T. 790; 70 J. P. 405; 4 L. G. R. 1049; Everett v. Tp. of Raleigh, 21 Ont. Rep. 91; McWilliams v. Kentucky Heating Co., 166 Ky. 26; 179 S. W. 24; L. R. A. 1916 A 1224 (a toll road).

For a case of a heavy pipe rolling over a child and killing it, where loosened by children, and gas company held not liable, see O'Hara v. Laclede Gaslight Co., 244 Mo. 395; 148 S. W. 884, reversing 131 Mo. App. 428; 110 S. W. Rep. 642.

[40] Grundy v. Janesville, 84 Wis. 574; 54 N. W. Rep. 1085.

[41] Otto Township v. Wolf, 106 Pa. St. 608.

[42] Potter v. Natural Gas Co., 183 Pa. St. 575; 39 Atl. Rep. 7; Snyder v. Philadelphia Co., 54 W. Va. 149; 46 S. E. Rep. 366; 63 L. R. A. 896.

[43] Dillon v. Washington Gaslight Co., 1 MacArthur (D. C.) 626; Robinson v. Imperial, etc., Co., 15 Gas J. 883; Weld v. Gaslight Co., 1 Starkie 150; Chisholm v. Halifax, 29 Nov. Sco. 402; McWilliams v. Kentucky Heating Co., 166 Ky. 26; 179 S. W. 24; L. R. A. 1916 A 1224; Helena Gas Co. v. Rogers, 104 Ark. 59; 147 S. W. 473.

[44] Buesching v. St. Louis, etc., Co.,

for a gas company to leave open cellar doors unguarded in a public sidewalk where the opening is twenty-two inches wide, forty inches long and thirty-four inches deep.[44a] If a gas company permit its gas mains or pipes to extend above the surface of the street, it will be liable, if thereby a vehicle driven along the street is injured.[44b] Where the gas company lays its mains in a toll turnpike by permission of the owner of the turnpike, it cannot escape its duty to maintain its mains consistent with the safety of the public.[44c] Where a gas company had refilled an excavation it had made in the street, except replacing the brick pavement, not replacing it because of the regulations of the city prohibiting it so doing; and a boy ran into the hole

73 Mo. 219; 11 Rep. 675, reversing 6 Mo. App. 85.

An agreement that the trench shall be "well and sufficiently closed up" and the land and premises "made good" is not complied with where the soil covering the pipes is in places from two to two and a half feet above the original level. Chisholm v. Halifax, *supra*.

Where a passenger, injured while alighting from a car by being thrown by a block of wood placed across a trench by a gas company, sued the carrier and gas company jointly, alleging in her statement of claim that the block had been placed by the gas company in a dangerous position, and that she had been negligently directed to alight at such place by the carrier, the sustaining of a demurrer to her complaint was proper, since the alleged negligence consisted of separate and independent acts of both defendants, over which neither had entire control. Howard v. Union Traction Co., 45 Atl. 1076, 195 Pa. St. 391.

Where a gas company had given bond to a city to indemnify it from damages resulting from suits against the city on account of accidents occasioned by excavations, and a judgment was recovered against the city, which it satisfied, a petition, in an action by the city against the gas company, setting out the recovery of the judgment and a copy of the bond, and making the sureties thereon parties defendant, contains but a single cause of action. Omaha Gas Co. v. City of Omaha, 71 Neb. 115; 98 N. W. 437.

[44a] Dehaven v. Danville Gaslight Co., 150 Ky. 241; 150 S. W. 322.

But usually negligence in failing to guard an excavation is a question for the jury. Helena Gas Co. v. Rogers, 104 Ark. 59; 147 S. W. 473.

[44b] Meskiman v. Ambraw Gas Co., 173 Ill. App. 171; Norton v. Pacific, etc., Co., 79 Wash. 625; 140 Pac. 905.

[44c] McWilliams v. Kentucky Heating Co., 166 Ky. 25; 179 S. W. 24; L. R. A. 1916 A 1224.

It is said the gas company laying its mains in a highway must exercise the highest degree of care to avoid injury to the user of such highway. Murphy v. Ludowici Gas & Oil Co., 96 Kan. 321; 150 Pac. 581; Belleview Gas & Oil Co. v. Carr (Okl.), 161 Pac. 203.

with his bicycle and was injured, it was held that the gas company was not liable.[44d] And where it was its duty to replace the pavement, and it let out the job to a contractor who left an unlighted pile of sand in the street, over which a traveler fell, to his injury, it was also held that the gas company was not liable, the negligence not being collateral to the work contracted for.[44e] Where an injury to an automobile was due *solely* to careless driving, it was held that the gas company was not liable, even though its trench in the street was improperly filled.[44f]

§ 772. Imperfectly constructed gas building.

A person was employed as a master machinist. A fire occurred in the gas room of the company; and he was directed by a superior to break down a door. He did as directed; but a wall fell on him and killed him. It was claimed that several times the roof had burned off the building, and after the last fire an iron roof supported by heavy girders had been put on the building. It was also claimed that the previous fires had so weakened the wall that it was not able to support the iron roof and girders; and that these girders expanded because of

[44d] Covington v. Exterkamp, 158 Ky. 599; 165 S. W. 967.

[44e] Pine Bluff Natural Gas Co. v. Senyard, 108 Ark. 229; 158 S. W. 1091.

Whether or not the plaintiff was guilty of contributory negligence is usually a question for the jury. Dehaven v. Danville Gaslight Co., 150 Ky. 241; 130 S. W. 322.

It is not contributory negligence to drive a traction engine into a public highway without looking for hidden gas pipes along the surface. Murphy v. Ludowici Gas & Oil Co., 96 Kan. 321; 150 Pac. 581.

The mere lapse of time between the negligent covering of an excavation and the injury does not prevent the negligence from being the approximate cause of the injury. City Gas Co. v. Lawrence, 118 Va. 557; 88 S. E. 73.

Where the defect is a gas pipe left exposed in the street, the plaintiff has the burden to prove that the pipe belongs to the defendant, but, since the question of the company's ownership is peculiarly within its knowledge, the burden rests somewhat more lightly upon the plaintiff than if the proof of ownership was equally available to both. Norton v. Pacific, etc., Co., 79 Wash. 635; 140 Pac. 905.

[44f] White v. Portland Gas & Coke Co. (Ore.), 165 Pac. 1105.

Where a horse shied and fell into a pit dug in the street by a gas company, the company was held liable. Helena Gas Co. v. Rogers, 104 Ark. 59; 146 S. W. 473.

the fire, and the gable being weak, it all tended to cause the wall to fall. It was held that as the complaint did not show the deceased was not acquainted with all the defects and risks, or had been lately employed, or that the wall became weak during his employment or he did not have charge of that particular part of the building, and consequently out of his line of duty, or the gas room was unfit for the purpose for which it was constructed, the complaint was deficient.[45]

§ 773. Exploding tank injuring servant.

A railroad company had its own gas plant, to manufacture gas it used. The person who was killed by it exploding was employed by the company before it was built. The railroad company organized a voluntary fire department composed of its employees; and the person killed was its chief. No one was required to join the fire company. The object of its formation was to extinguish fires breaking out in the railroad shops. The railroad company located the water plugs and pipes, furnished the fire apparatus, permitted the persons composing the fire company to drill frequently during working hours, during which hours they were paid their regular wages. Once a week the chief was allowed an hour to inspect the shops as a precaution against fire. The chief was killed by an explosion of the gas plant when endeavoring to put out a fire in the shops. He had nothing to do with the manufacture of the gas, being employed only as a machinist, although he frequently repaired the gas plant. It was claimed that the railroad company had negligently used a tar roof when it should have used a slate or a metal one; and that the gas tanks were too close to the fire in the gas retorts. The gas tanks were twelve feet from the gas retorts, and were separated by a brick wall. Metal roofs were generally in use on such buildings, where roofs were used. On the ground that the negligence of the railroad company must have been a reckless indifference to the safety of the

[45] Allen v. Augusta Factory, 82 Ga. 76; 8 S. E. Rep. 68; Hulett v. Pudsey Gas Co., 28 Gas J. 663. See as to fall of a gate, Allen v. New Gas Co., L. R. 1 Exch. Div. 251; 45 L. J. Exch. 668.

public to render it liable, or an intentional failure to perform a manifest duty, the company was held not liable.[46]

§ 774. Servant entitled to safe place in which to work.

A servant is entitled to a safe place in which to work. Thus where a contractor had one "gang" of men digging a trench and another laying pipe in the same trench; and a servant with the latter gang was assured by the master that the trench was a safe place in which to work, and there was nothing to indicate that it was unsafe, the master was held liable to the servant for injuries he received by the walls of the trench caving in upon him.[47] A servant of a gas company dug a trench in front of a boiler, and left it in an unsafe condition. Another servant who fired the furnace under the boiler, and who in so doing had to work near the trench, was injured because of its unsafe condition. It was held that as the injured servant assumed only such risks as were incident to his employment, and such as were apparent and the ordinary risks, he did not assume the risk of the hole in front of the boiler, and was entitled to recover.[48] It was held differently where a trench was dug by a city, which the master had no control over and never saw, and the city ordered the master to remove some gas pipe from the trench, and to comply with the order sent the servant to do so, and in doing so the earth caved in and injured him.[49] A servant of a gas company assisted in raising a gas tank over a building. In doing so some boards were left on a scaffold built along the wall of the building over which the tank was to be raised. The boards were loose and in an unsafe condition, and fell because the foreman failed to steady the tank which shook them. They

[46] Collins v. Cincinnati, etc., Co., 13 Ky. Rep. 670; 18 S. W. Rep. 11; King v. National Oil Co., 81 Mo. App. 155.

[47] Schmidt v. Gillen, 41 N. Y. App. Div. 302; 58 N. Y. Supp. 458; Baird v. Reilly, 92 Fed. Rep. 884.

[48] Frye v. Bath Gas, etc., Co., 94 Me. 17; 46 Atl. Rep. 804.

[49] Hughes v. Malden, etc., Co., 168 Mass. 397; 47 N. E. Rep. 125.

fell and injured the servant; and it was held that the company was liable, on the theory that the master was bound to furnish the servant a safe place in which to work, and was bound to remove the boards that caused the injury.[50] But the seller of oil in a tank on his premises is not bound to provide a safe place to work for the employee of the buyer engaged in removing the oil by night—as affecting liability for their death from an explosion of the oil. The buyer is, however, bound to furnish them a safe place and proper appliances, including proper light. In this case evidence of warning given the employees of the vendee by a representative of the vendor was held admissible to show an assumption of the risk by them, and possibly upon the question of contributory negligence in the use of a lantern.[50a]

§ 775. Servant injured by use of defective ladder.

A servant of a gas company was directed to remove some boards which were over a gas generator. To do this he had to use a ladder; and he used one that was shorter than the one he was directed to use. He ascended to the place directed, the ladder was too short to reach it, but he used other means. He was overcome with gas that had accumulated at the place to which he was directed to go and fell, receiving severe injuries from which he died. In an action brought to recover for his death on the ground that the place to which he was sent was a dangerous one, it was held to be immaterial whether the ladder was too short or not, for it had nothing to do with the fall; because the fall was caused by the inhalation of poisonous gases, and it could make no difference how he made his ascent.[51] It was the duty of a servant to light the lamps in front of his mas-

[50] Bagley v. Consolidated Gas Co., 13 N. Y. Misc. Rep. 6; 34 N. Y. Supp. 187.

Notice of danger of gas in cask. King v. National Oil Co., 81 Mo. App. 155.

[50a] Cooper v. Fidelity Development Co., 131 N. Y. Supp. 457.

[51] Citizens' Gaslight, etc., Co. v. O'Brien, 118 Ill. 174; 8 N. E. Rep. 310.

ter's residence, and to do this he had to use a ladder. The ladder was insecure because of the absence of spikes, and the servant told his foreman of that fact, who promised to put in proper spikes, but did not do it, and on being told a second time, made the same promise. The defect in the ladder continued, and the servant fell from it one stormy night and was injured. The fall was occasioned by the absence of the spikes. It was held that the master was not liable, for the reason that the work and use made of the ladder was only ordinary labor; and the servant was as familiar with the defects as his master.[52] A servant of a gas company had for several years been employed to make general repairs. By one in authority he was directed to clean a condenser. To get to the place to do the cleaning he had to use a ladder, and used one furnished by the company. The ladder had no spikes in the end resting on the floor, and the place where it rested was smeared with grease and oil. When the servant was ascending, it slipped, he was thrown to the ground, and injured. He claimed the injury was caused by the absence of the spikes. The servant, some time before the accident, had told the officers of the gas company that the ladder was unsafe. It was held that the attempt to ascend the ladder under the circumstances was negligence, if not recklessness, and a bar to a recovery; for the servant knew the facts as well as the master.[53]

§ 776. Kindling fire with oil.

The use of kerosene for the purpose of kindling a fire is not in itself contributory negligence.[54] In an action for damages occasioned by exploding oil negligence is shown on the part of the defendant where it is alleged that the oil sold by the defendant was below the statutory test, and that if it had been up to that test no explosion would have taken place and consequently no injuries been inflicted.[55] If a person attempt to re-

[52] Marsh v. Chickering, 101 N. Y. 306; 5 N. E. Rep. 56. The court said that the rule applicable to complicated machinery did not apply.

[53] Corcoran v. Milwaukee, etc., Co., 81 Wis. 191; 51 N. W. Rep. 328.

[54] Peterson v. Standard Oil Co., 55 Or. 511; 106 Pac. Rep. 337; Ellis v. Republic Oil Co., 133 Iowa 11; 110 N. W. Rep. 20 (gasoline used but thought to be kerosene); Standard Oil Co. v. Reagan, 15 Ga. App. 571; 84 S. E. 69.

[55] Peterson v. Standard Oil Co., 55 Or. 511; 106 Pac. Rep. 337. Where an action against store-

light a dying fire, or to kindle a new one, without first assuring himself there is no fire in the stove, by pouring kerosene directly from the can, his act is negligence *per se*. A minor son, residing with his parents or a member of the household, is entitled to use kerosene in a can to kindle a fire in the stove exactly the same as are his parents; so that for his death from explosion of kerosene or gasoline in a can, his parents will not be precluded from recovering of the refining company which furnished the oil on the ground that the son was a mere licensee.[55a]

§ 777. Drawing gasoline near furnace fire.

It is an act of negligence to draw so volatile a substance as gasoline from tanks near a fire; for the gases arising from the gasoline will almost certainly spread to the fire and cause an explosion. And it is no defense that the fire in the furnace never before ignited the gasoline when a drawing took place. A person who has handled petroleum and gasoline is chargeable with notice of the highly inflammable character of the gases generated by them; and he must exercise great care to prevent an injury which a prudent man would reasonably forsee might result from an explosion. It may be shown by any one well acquainted with gasoline, that gas given off from it is ignitible at distances remote from it, and such distances may be shown by him, after the conditions have been shown upon which to predicate his testimony.[56]

§ 778. Gasoline plant out of order exploding.

The owner of a dwelling house constructed a gasoline plant for lighting it; and when it was constructed the builder of the plant instructed the owner's servant how to fill it. The defendant ordered a dealer of gasoline to furnish him a barrel

keepers, for personal injuries due to an explosion of gasoline, claimed to have been negligently delivered to plaintiff for kerosene in a can not intended for gasoline, it appeared plaintiff took the can from her parents, and presented it to defendants as a proper receptacle for gasoline or kerosene, whichever she ordered, and the can then had some oil in it, the fact that defendants violated the Iowa Code, Supp. 1907, Sec. 2510j, in filling it, was not material to any inquiry in the case, as it was not the proximate cause of her injuries resulting from the explosion when she afterwards undertook to use a part of the oil to replenish a fire in a cook stove. DuBois v. Luthmer 147 Iowa 315; 126 N. W. 147.

[55a] McLawson v. Paragon Refining Co. (Mich.), 164 N. W. 668; Riggs v. Standard Oil Co., 130 Fed. 199; Dubois v. Luthmers, 147 Iowa 315; 126 N. W. 147; Morrison v. Lee, 13 N. D. 591; 102 N. W. 223; Anderson v. Standard Oil Co. (Ia.), 164 N. W. 169.

[56] Waters-Pierce Oil Co. v. Snel, 47 Tex. Civ. App. 413; 106 S. W. Rep. 170.

of gasoline for the tank; and he brought a barrel to it. The tank was filled through a receiving box on the outside of the house, where the person filling the tank could not see it, the tank. The dealer had no reason to apprehend that any of the appliances about the tank were not in perfect order. In filling it the oil overflowed and an explosion took place. The dealer did not know it was overflowing. It was held that the defendant was not liable..[57]

§ 779. Escaping oil or gas injuring land.

If the owner or controller of a gas or oil well negligently permit the oil or gas to escape, and it injures the land, the owner of the land or lessor has a right of action against him.[58]

[57] Waters-Pierce Oil Co. v. Van Elderen, 137 Fed. Rep. 557.

[58] Talbott v. Southern Oil Co., 60 W. Va. 423; 55 S. E. Rep. 1009.

CHAPTER XXXI.

INSURANCE.

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§ 780. Extent of discussion.

Necessarily, the extent of the discussion of the subject matter of this chapter must be brief, and only insurance cases be cited. Little, if any, methodical order can be followed. Usually litigation concerning the use or storage of oil in the insured building arises over the difference between the printed terms and the written clauses of the policy, or because of the conflict between the "rider" and the terms of the policy proper. The custom of trade, too, must be taken into consideration, for it has a very decided bearing upon the interpretation of fire insurance policies.

§ 781. Conflict between rider or written part and printed part of policy.

A "rider" is always something attached to a policy, and is an addition to it, either by expressly changing the terms of the policy or adding thereto. It is regarded as the last expression of the parties to the policy. In case of a conflict between the language of the policy and rider, the latter will control; just as in case there is a conflict between the printed portions of a policy and written words inserted in it, the latter will control, if the two cannot be construed together.[1]

§ 782. "On the premises."

It is sometimes difficult to determine whether or not the prohibited article has been kept on the premises within the

[1] Yoch v. Home, etc., Ins. Co., 111 Cal. 503; 44 Pac. Rep. 189; 34 L. R. A. 857; Lancaster Fire Ins. Co. v. Lenheim, 89 Pa. St. 497; 33 Am. Rep. 778; Gunther v. Liverpool, etc., Ins. Co., 85 Fed. Rep. 846; Russell v. Manufacturers', etc., Ins. Co., 50 Min. 409; 52 N. W. Rep. 906; Phœnix Ins. Co. v. Flemming, 65 Ark. 54; 44 S. W. Rep. 464; 39 L. R. A. 789; Faust v. American Fire Ins. Co., 91 Wis. 158; 64 N. W. Rep. 883; 30 L. R. A. 783; O'Neil v. Caledonian Ins. Co., 166 Cal. 310; 135 Pac. 1121.

meaning of a provision prohibiting the keeping of such an article "on the premises." It is clear that such a phrase cannot be so extended as to include a building other than the one covered by the policy, so that keeping the prohibited article in such building will not avoid the policy.[2] The keeping of gasoline in the yard twelve feet from the insured building is not a breach of a condition of a policy which prohibits the storage or use of gasoline in or on the premises.[3] Nor is such a policy avoided by the storage of the gasoline in a tank underground thirty-five feet from the insured building, where by means of certain machinery it is vaporized and the vapor carried into the building by a pipe and used for lighting.[4] A policy placed on a "three-story brick gravel roof hotel building, occupied by the assured," and known as the Tremont Hotel, situated on lots 9 and 12 gave permission "to light premises with gasoline," but provided that "no gasoline should be stored on the premises." It was held that the word "premises" meant the building insured, and the insured was not prohibited from depositing gasoline for the use of the hotel, in reasonable quantities, on his own lots outside the hotel.[5] A policy on a specifically described steam flour mill and machinery prohibited the keeping of petroleum on "the premises." The insured kept a barrel of petroleum in an engine house adjoining, but not included in the specific description of the premises. The fire that destroyed the mill originated in it and not in the engine room. It was held that the petroleum had not been kept on "the premises," and that the policy was not avoided.[6] The use of naphtha for four weeks to burn off the paint on the outside of a house, using it within a few inches of the outer wall, is the bringing of naphtha

[2] Sperry v. Insurance Co., 22 Fed. Rep. 516. See Hanover Fire Ins. Co. v. Stoddard, 52 Neb. 745; 73 N. W. Rep. 291.

[3] La Force v. Williams, etc., Ins. Co., 43 Mo. App. 518.

[4] Queen Ins. Co. v. Sinclair, 1 Ohio Cir. Ct. Rep. 496; Arkell v. Commerce Ins. Co., 69 N. Y. 191; 25 Am. Rep. 168, affirming 7 Hun 455.

[5] Northwestern, etc., Ins. Co. v. Germania Fire Ins. Co., 40 Wis. 446.

[6] Carlin v. Western, etc., Co., 57 Md. 515; 40 Am. Rep. 440.

"on the premises."[7] Permission was given to remove insured goods to "the three-story . . . building occupied as a . . . store, situated at No. 72 E. Street." Just back of the three-story building was a one-story addition which opened into it by a door and window, which was included under the street number 72. For a long time previous to the granting of the permission the addition was occupied as a part of the store, and in it some of the insured goods were put. It was held that this addition was such a part of the premises as to prohibit the keeping of gasoline in it.*[7] In this instance the gasoline was kept and used in a gasoline stove in an upstairs room which had no connection with the store, and was reached by an outside stairway. A policy provided that it should be void if illuminating gas or vapor should be generated in the building or adjacent thereto, to use therein. The insured manufactured a gaseous fluid from gasoline and other ingredients, which was kept in a shed separated from the insured building, and used in a lamp for lighting, a portion of it being kept on a shelf in the back part of such building. The insured had used all the fluid several days before the fire occurred, and was not using it at the time of the fire. It was held that the facts warranted a finding that no illuminating gas was generated in the building for use therein.[8] Where the policy prohibited the using or depositing of oil on the premises, the policy covering the house only; and the gasoline was kept in the barn and brought into the house as needed and there used, it was held that the policy was thereby avoided.[9]

[7] First Congregational Church v. Holyoke, etc., Ins. Co., 158 Mass. 475; 33 N. E. Rep. 572; 35 Am. St. Rep. 508; 19 L. R. A. 587.

*[7] Boyer v. Grand Rapids Fire Ins. Co., 124 Mich. 455; 83 N. W. Rep. 124; Norwaysz v. Thuringia Ins. Co., 204 Ill. 334; 68 N. E. Rep. 551, affirming 104 Ill. App. 390.

[8] Phœnix Ins. Co. v. Shearman, 17 Tex. Civ. App. 456; 43 S. W. Rep. 930, 1063.

[9] Pennsylvania Ins. Co. v. Faires, 13 Tex. Civ. App. 111; 35 S. W. Rep. 55.

§ 783. "Contiguous" to insured building.

A policy prohibited "the generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting." After the policy was issued, the insured constructed works fifty feet from the building for the manufacture of gas from gasoline; and the gas when manufactured was conducted to the building by pipes. It was held that the policy was not avoided, for the gas works were not "contiguous" to the building, within the meaning of the clause quoted.[10]

§ 784. Oil for illumination.

The prohibition against the use of enumerated oils upon the premises will not, as a rule, prohibit their use for necessary illuminating purposes. Such was held to be the case of the use of naphtha,[11] and of kerosene.[12] Where a clause in a policy prohibited the storing or use of "petroleum, rock or earth" oil on the premises, and another clause prohibited the lighting of the premises by means of certain inflammable substances, not including kerosene, lighting the building with kerosene, and keeping on hand in it a reasonable quantity for that purpose, was held not to avoid the policy.[13] A policy providing that kerosene or oil might be used for light and kept for sale, but in quantities not exceeding five barrels, provided it be drawn and filled by daylight or ten feet from artificial light, does not apply to kerosene kept for heaters in the house.[13a]

[10] Arkell v. Commerce Ins. Co., 69 N. Y. 191; 25 Am. Rep. 168; affirming 7 Hun 455.

[11] Putnam v. Commonwealth Ins. Co., 4 Fed. Rep. 753.

[12] Jones v. Howard Ins. Co., 117 N. Y. 103; 22 N. E. Rep. 578; 10 N. Y. St. Rep. 120; Bennett v. North British, etc., Co., 8 Daly 471; Hall v. Insurance Co., 58 N. Y. 292; 17 Am. Rep. 255; Bennett v. North British, etc., Ins. Co., 81 N. Y. 273; 37 Am. Rep. 501.

[13] Buchanan v. Exchange Fire Ins. Co., 61 N. Y. 26.

[13a] Phœnix Ins. Co. v. Fleenor, 104 Ark. 119; 148 S. W. 650.

§ 785. Time of filling lamps.

Where the use of oil is expressly permitted for illuminating purposes, a clause is frequently inserted providing when the lamps must be filled, almost universally requiring that work to be performed in the daytime. A violation of such a provision avoids the policy. Thus where a policy required the lamps "to be filled and trimmed by daylight," it was held that the policy was avoided by the drawing on the premises of carbon oil to loan to a neighbor about dusk, near a lighted lantern, though not for the purpose of filling lamps, by any person acting for the insured, whereby a fire was caused, the policy only permitting carbon oil to be used on the premises for lighting purposes.[14] But where a policy provided that the insurer should not be liable for a loss caused by the use of kerosene, unless permitted on the policy in writing, it was held that a recovery on the policy could not be defeated on the ground that lamps were filled with kerosene in the evening, and by artificial light, unless it was shown that the loss was occasioned thereby.[15] So where the policy prohibited the use of camphene, spirit gas, burning fluid, or chemical oils, but permitted the use of refined coal oil, kerosene, or other carbon oil for lights, if drawn and the lamps filled by daylight, it was held that it was not avoided by using lard oil and candles, and filling the lamps with it at night.[16]

§ 786. Failure to extinguish lamps.

A policy granted the privilege of using kerosene oil for lights in the daytime, and provided that they should be extinguished at the close of the day's business. It was held that the mere fact that at some time during the life of the policy the insured

[14] Gunther v. Liverpool, etc., Ins. Co., 134 U. S. 110; 10 Sup. Ct. Rep. 448; Liverpool, etc., Ins. Co. v. Gunther, 116 U. S. 113; 34 Fed. Rep. 501.

[15] Jones v. Howard Ins. Co., 117 N. Y. 103; 22 N. E. Rep. 578.

[16] Carlin v. Western, etc., Co., 57 Md. 515; 40 Am. Rep. 440.

failed to extinguish the lamps at the close of the business of the day could not prevent a recovery, unless the risk by such failure was increased; for the reason that the doing of an act which the policy prohibits for the manifest purpose of preventing an increase of the risk will not work a forfeiture.[17]

§ 787. The oil prohibited.

If a particular kind of oil is prohibited, then the keeping of another kind will not avoid the policy. Thus prohibiting the use of camphene, spirit gas, burning fluid, or chemical oils, but permitting the use of refined coal oil, kerosene, or other carbon oil for lights, if drawn and the lamps be filled by daylight, will not prohibit the use of lard oil and candles, even though the lamps be filled at night.[18] But a clause prohibiting the keeping of petroleum will prohibit the keeping of gasoline, for gasoline is a product of petroleum, though it be not named in the policy as a prohibited article.[19] In the absence of proof a court cannot hold kerosene oil to be a "burning fluid or chemical oil."[20] "French Electric Fluid" has been held to be the equivalent of benzine.[21] Whether benzine was a "burning fluid or chemical oil" within the meaning of a policy on a distillery forbidding the assured to keep or have "camphene, spirit gas, or any burning fluid or chemical oils" on the premises was held to be a question of fact.[22] A policy provided that "camphene, spirit gas, naphtha, benzine or benzole, chemical, crude or refined coal or earth oils" should not be kept or used on the premises, but this was held not to prevent the use of kerosene oil, the

[17] Fireman's Ins. Co. v. Cecil, 12 Ky. L. Rep. 48, 259.

[18] Carlin v. Western, etc., Co., 57 Md. 515; 40 Am. Rep. 440.

[19] Kings County Fire Ins. Co. v. Swigert, 11 Ill. App. 590.

[20] Mark v. National Fire Ins. Co., 24 Hun 565.

[21] Phœnix Ins. Co. v. Shearman, 17 Tex. Civ. App. 456; 43 S. W. Rep. 930, 1063.

[22] Mears v. Humboldt Ins. Co., 92 Pa. St. 15; 37 Am. Rep. 647.

phrase "crude or refined coal or earth oils" being limited by the remaining words in the sentence in which they were used so as not to prohibit the use of kerosene.[23] Where an assured, thinking he was using a mixture of sperm and lard oils, for lubricating purposes, when in fact he was using a compound of those oils with petroleum, which was equally as safe, it was held that there was no breach of a condition of the policy that only sperm and lard oils should be used.[24] The use of a gasoline engine in an insured barn, for driving threshing machinery, does not forfeit a policy containing a clause prohibiting the using or keeping of combustible fluids.[24a]

§ 788. Prohibited user not occasioning loss.

Whether or not the user of the prohibited article occasioned the loss is an immaterial question; for if the article be used contrary to the terms of the policy, it will avoid such policy, although the loss be occasioned by another and distinct cause.[25]

[23] Morse v. Buffalo, etc., Ins. Co., 30 Wis. 534; 11 Am. Rep. 587.

[24] Copp v. German-American Ins. Co., 51 Wis. 637; 8 N. W. Rep. 127, 616.

A prohibition against the keeping of nitroglycerine was held to exclude giant powder, the evidence showing that the latter was almost wholly composed of the former. Sperry v. Springfield, etc., Ins. Co., 26 Fed. Rep. 234; 15 Ins. L. Jr. 270.

Under a policy insuring goods while located and contained in a building described on premises described, and providing that, if illuminating gas or vapor be generated in the building, or there be kept, used, or allowed on the premises dynamite or other explosives, the policy shall be void, a contention that explosives stored in the building were not forbidden by the policy is untenable. Kennefick-Hammond Co. v. Norwich Union Fire Ins. Soc., 80 S. W. 694; St. Paul Fire & Marine Ins. Co. v. Penman, 151 Fed. Rep. 961; 81 C. C. A. 151.

[24a] Bouchard v. Dirigo Mut. Fire Ins. Co., 113 Me. 17; 92 Atl. 899.

[25] Pennsylvania Fire Ins. Co. v. Faires, 13 Tex. Civ. App. 111; 35 S. W. Rep. 55; Williams v. People's Fire Ins. Co., 57 N. Y. 274; Faulker v. Central Fire Ins. Co., 1 Kerr (N. B.) 279; Trustees, etc., v. Williamson, 26 Pa. St. 196; Commercial Ins. Co. v. Mehlman, 48 Ill. 313; Couch v. Rochester, etc., Ins. Co., 25 Hun 469; Duncan v. Sun Fire Ins. Co., 6 Wend. 488; Diehl v. Adams County, etc., Ins. Co., 58 Pa. St. 443; Murdock v. Chenango,

But where a policy provided that the insurer "will not be liable under or by virtue of this policy for loss or damage caused by the working of mechanics . . . nor for the use of kerosene . . . unless permitted hereon in writing;" and it was claimed that the insured violated the policy by filling his lamps with kerosene in the evenings, by artificial light; it was held that as the fire and the consequent loss did not have its origin from the use of the kerosene the insurer was liable.[26] So it has been held that if gasoline was brought upon the premises contrary to the prohibitory clause of the policy, but it was not there when the loss occurred, the policy was not thereby avoided, although if it had been there when the fire occurred, the policy would have been avoided.[27] So where kerosene could only be used for lighting purposes, but it was used for fuel purposes, the company was held liable, the use of the kerosene not causing the fire.[28]

§ 789. Owner himself must violate terms of policy.—Tenant.

The rule is, to avoid a policy, the insured himself must have done the act prohibited by it, or, at least, suffered others to do it. Thus where workmen in a factory used friction matches to some extent contrary to orders of the insured, the court instructed the jury that the use of matches contemplated by the policy to render it void must have been a use by authority, ex-

etc., Ins. Co., 2 N. Y. 210; White v. Western, etc., Co. (Pa.), 6 Atl. Rep. 113; Kennefick-Hammond Co. v. Norwich, etc., Soc., 80 S. W. Rep. 694; Norwaysz v. Thuringia Ins. Co., 204 Ill. 334; 68 N. E. Rep. 551, affirming 104 Ill. App. 390.

[26] Jones v. Howard Ins. Co., 117 N. Y. 103; 22 N. E. Rep. 578.

[27] Traders' Ins. Co. v. Catlin, 163 Ill. 256; 45 N. E. Rep. 255; 59 Ill. App. 162. See New England, etc., Ins. Co. v. Wetmore, 32 Ill. 221; Germania Fire Ins. Co. v. Klewer, 129 Ill. 599; 22 N. E. Rep. 489; Phœnix, etc., Co. v. Munger (Tex. Civ. App.), 49 S. W. Rep. 271.

See the rather remarkable case of Traders' Ins. Co. v. Race, 142 Ill. 338; 31 N. E. Rep. 392.

[28] Snyder v. Dwelling House Ins. Co., 59 N. J. L. 544; 37 Atl. Rep. 1022, reversing 34 Atl. Rep. 931; McClure v. Mutual Fire Ins. Co., 242 Pa. 59; 88 Atl. 921.

press or implied, of the insured; that what was going on in the premises he was bound to know; that if he knew, or as a prudent man ought to have known, that matches were used, then his order would not help him; and that the use meant was a known and permitted use. These instructions were held to be correct.[29] But if a person occupying the premises with the consent of the insured, as his tenant, for instance, violates the prohibitory clause of the policy, his act is the act of the insured.[30] The fact that the breach of the policy occurred through the orders of the husband and general manager of the tenant of the assured, although he was not acting by express or implied authority from such insured, was held not to relieve him from the responsibility for the breach of the prohibitory condition.[31]

§ 790. Explosions.—No clause of exemption.

If there be no clause in the policy exempting the insurer from loss occasioned by an explosion, then such insurer will be liable for the loss. Thus where a policy had no such exempting clause, and a match was applied to a keg of powder which exploded, threw off the roof of the insured building, and did other damage, the insurer was held liable.[32] A clause in a policy provided that the insurer should not be liable "for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind." The building

[29] Farmers' etc., Ins. Co. v. Simmons, 30 Pa. St. 299.

[30] German Fire Ins. Co. v. Board, 54 Kan. 732; 30 Pac. Rep. 697; Kelly v. Worcester, etc., Ins. Co., 97 Mass. 284; 5 Benn. Fire Ins. Co., 122; Duncan v. Sun Fire Ins. Co., 6 Wend. 488; Badger v. Platts, 68 N. H. 222; 44 Atl. Rep. 296; Kohlmann v. Selvage, 34 N. Y. App. Div. 380; 54 N. Y. Supp. 230 (landlord did not know tenant was using gasoline for a light); Adair v. Southern, etc., Ins. Co., 107 Ga. 207; 33 S. E. Rep. 78; Norwaysz v. Thuringia Ins. Co., 204 Ill. App. 334; 68 N. E. Rep. 551; 104 Ill. App. 390; McCurdy v. Orient Ins. Co., 30 Pa. Super. Ct. 77.

[31] Liverpool, etc., Ins. Co. v. Gunther, 116 U. S. 113; 6 Sup. Ct. Rep. 306; Gunther v. Liverpool Ins. Co., 85 Fed. Rep. 846.

[32] Scripture v. Lowell, etc., Ins. Co., 10 Cush. 356; Waters v. Merchants', etc., Ins. Co., 11 Pet. 213; Hobbs v. Guardian, etc., Co., 12 Can. Sup. Ct. 631.

insured was destroyed by fire, which was the immediate result of an explosion; and the insurer was held liable, the court saying of the policy: "It secures exemption from liability from losses caused by explosions, but not from liability for losses by fire caused by explosions."[33]

In a Missouri case the following language was used, which shows the line of reasoning in cases of this kind: "If fire was the direct and proximate cause of the damage, the responsibility therefor becomes fixed. It would make no difference whether it manifested itself in combustion or explosion. . . . The explosion of a coal oil lamp, caused by the generating of gas, may not in a moment communicate the fire to the entire building, but it may result in as complete destruction as the ignition of gas, which permeates every part of the building, and destroys the whole by an instantaneous blaze. Powder may be ignited either in quantities only sufficient to communicate fire to combustible materials around it, or sufficient to demolish the largest building. There would be only a difference in degree between the one and the other. No reason can be seen why an exception to an indemnity against loss by fire should be made because the work of destruction is instantaneous and by explosion, rather than through the slow process of gradual communication and combustion."[34]

[33] Commercial Ins. Co. v. Robinson, 64 Ill. 265; Heffron v. Kittanning Ins. Co., 132 Pa. St. 580; 20 Atl. Rep. 698; Renshaw v. Missouri, etc., Ins. Co., 33 Mo. App. 394; Greenwald v. ——— Ins. Co., 3 Phila. 323; City Fire Ins. Co. v. Corlies, 21 Wend. 367; Boatman's Fire Ins. Co. v. Parker, 23 Ohio St. 85; Hall & Hawkins v. National Fire Ins. Co., 115 Tenn. 513; 92 S. W. Rep. 402; German-American Ins. Co. v. Hyman, 42 Colo. 156; 94 Pac. Rep. 27.

Where a policy of insurance excludes damages caused by explosion, and the insurer in an action thereon proves that an explosion preceded the fire, the burden is on plaintiff to prove the extent of the damages suffered from the subsequent fire. German-American Ins. Co. v. Hyman, *supra*.

[34] Renshaw v. Missouri, etc., Ins. Co., 103 Mo. 595; 15 S. W. Rep. 945; Aetna Ins. Co. v. Boon, 95 U. S. 117; American Steam, etc., Ins.

§ 791. Explosions of oil or gas.

The general rule is that the ordinary fire policies do not cover losses occasioned by explosions not directly connected with fire, such as a loss occasioned by the explosion of a steam boiler.[35] So, too, an explosion of gunpowder that wrecks a house is not such an act as a fire policy covers; and it cannot be said that the fire which ignited the powder was the fire insured against.[36] So where a policy provided that the insurance company should not be liable "for loss caused by . . . explosions of any kind unless fire ensues, and then for the loss or damage by fire only"; and vapors arising from the works in the mill insured, where the rectifying of spirits was carried on, came in contact with a burning lamp in the mill, left there

Co. v. Chicago, etc., Co., 57 Fed. Rep. 294; 21 L. R. A. 572; Boatman's, etc., Ins. Co. v. Parker, 23 Ohio 85.

A house contained an acetylene gas plant. One of the owner's children filled the generating machine of the plant with water and carbide. This was in the cellar. Shortly after the owner's wife smelled gas, and one of the children struck a match, and as she did so there was a flash of light all over the house, followed by a report and the falling of the plaster. Immediately after the report some of the studding, rafters and furniture was found on fire. It was shown that gas generated by carbide would not explode unless ignited. It was held that the explosion was a fire within a policy stipulating for indemnity from loss by fire and containing no exemption from explosions. Furbash v. Consolidated, etc., Ins. Co., 140 Iowa 240; 118 N. W. Rep. 371.

Although not liable for damages caused by an explosion, yet a company is liable for the damages caused by the fire started by the explosion. Heffron v. Kittaning Ins. Co., 132 Pa. St. 580; 20 Atl. Rep. 698.

A fire causing an explosion and rendering an insurer liable for the damage caused by the explosion under a policy excluding explosion as causes of loss must be an actual fire according to the common use of the term, and not a blaze produced by lighting a match, gas jet, or lamp. German-American Ins. Co. v. Hyman, 42 Colo. 156; 94 P. 27.

[35] Insurance Co. v. Tweed, 7 Wall 44; Waldeck v. Springfield, etc., Ins. Co., 56 Wis. 96; 14 N. W. Rep. 1; 12 Ins. L. Jr. 177; St. John v. American, etc., Ins. Co., 11 N. Y. 516; 1 Duer 371; 3 Benn. Fire Ins. Cas. 760; Millaudon v. New Orleans Ins. Co., 4 La. Ann. 15; 3 Benn. Fire Ins. Cas. 4.

[36] Everett v. London Assurance Co., *supra;* Caballero v. Home Insurance Co., 15 La. Ann. 217; German Ins. Co. v. Roost, 55 Ohio St. 581; 45 N. E. Rep. 1097; 36 L. R. A. 236; Phœnix Ins. Co. v. Adams (Ky.), 127 S. W. Rep. 1008; 34 (Ky), 127 S. W. Rep. 1008.

by persons repairing the machinery, causing an instantaneous explosion, which blew off the roof of the mill, blew down the greater part of the walls, injured the machinery, and produced a fire which occasioned some damage, though slight compared with that caused by the explosion, it was held that the insurance company was liable only for the damages caused by the fire, and not for those caused by the explosion itself.[37] So where, under a like exemption clause, a mixture of whiskey vapor in a store insured and atmosphere came in contact with a gas jet and exploded, setting a fire in motion which destroyed the insured property; it was held that the loss was from the fire occasioned by the explosion, and that the company was not liable for it, and that the burning gas jet "was not such a fire as was contemplated by the parties as the peril insured against." The court said: "The gas jet, though burning, was not a destructive force, against the immediate effects of which the policy was intended as a protection. Although it was a possible means of putting such destructive force in motion, it was no more the peril insured against, than a friction match in the pocket of an incendiary."[38] The same was held where illuminating gas in a room was ignited by the striking of a match, for the reason that the explosion and not the lighting of the match was the proximate cause of the loss.[39] So where a loss was occasioned by a lighted fire being applied to some unknown substance placed in a doorway, which broke the windows, broke the door sill and slightly discolored some of the paint on the house, it was held that the company was not liable.[40] But where fire

[37] Briggs v. North American, etc., Ins. Co., 53 N. Y. 446.

[38] United Life Ins. Co. v. Foote, 22 Ohio St. 340; 2 Ins. L. Jr. 190.

[39] Heuer v. Northwestern, etc., Ins. Co., 144 Ill. 303; 33 N. E. Rep. 411; Heuer v. Winchester Fire Ins. Co., 151 Ill. 331; 37 N. E. Rep. 873; affirming 45 Ill. App. 239; Tannert v. ———— Ins. Co., 34 La. Ann. 249; Roe v. Columbus, etc., Ins. Co., 17 Mo. 301; Montgomery v. Fireman's Ins. Co., 16 B. Mon. 427.

[40] Phœnix Ins. Co. v. Greer, 61 Ark. 509; 33 S. W. Rep. 840.

See on this same subject Hobbs v. Guardian, etc., Co., 12 Can. Sup. Ct. 631; Washburn v. Miami, etc., Ins. Co., 2 Fed. Rep. 633; 2 Flipp. 664; 9 Ins. L. Jr. 68; Dowe v. Faneuil Hall Ins. Co., 127 Mass. 346; Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70; Smiley v. Citizens', etc., Co., 14 W. Va. 33.

exists on the premises or on the premises adjacent thereto, and in its progress reaches an explosive, causing an explosion, from which loss results, the fire is the proximate cause of the loss, and the insurer liable.[41] A policy of insurance provided that "neither will the company be responsible for loss or damage by explosion, except from explosion by gas." On the premises an inflammable and explosive vapor was evolved in the process of extracting oil from shoddy. The oil caught fire and afterwards exploded, causing a further fire, besides the damage by the explosion itself. It was held that the word "gas" as used in the policy meant illuminating coal gas, and that the insurer was liable for the damage caused by the exploding gas which occurred in the course of the fire, but not for the damages caused by the explosion and the fires which it caused.[42] Where a policy issued to an express company provided "that no loss is to be paid arising from petroleum or other explosive oils or in case of a collision; and a collision took place with a train loaded with petroleum, and the petroleum took fire and the fire consumed the goods insured, the insurer was held not liable.[43] Gasoline was kept in a retail store and tin store. The store was covered by a policy insuring the stock of goods, and to the policy was attached a written clause which included a grant of the privilege to keep a limited quantity of gasoline. The printed clauses of the policy excluded all liability for explosives of any kind, unless fire ensued, and then covered loss or damage by fire only. An explosion was caused by the gasoline, and for the loss thus incurred the insurer was held not liable.[44]

[41] Washburn v. Western Ins. Co., 2 Fed. Rep. 633; Fed. Cas. No. 17216; 9 Ins. L. Jr. 424; Washburn v. Artisans' Ins. Co., Fed. Cas. No. 17212; 9 Ins. L. Jr. 68; Orient Ins. Co. v. Leonard, 120 Fed. Rep. 808.

[42] Stanley v. Western, etc., Co., L. R. 3 Exch. 71; 37 L. J. Exch. 73; 17 L. T. (N. S.) 513; 16 W. R. 369.

[43] Imperial Fire Ins. Co. v. Fargo, 95 U. S. 227.

[44] Mitchell v. Potomac Ins. Co., 183 U. S. 42; 22 Sup. Ct. Rep. 22, affirming 16 U. S. App. D. C. 241.

§ 792. Failure to disclose use of oil.

If the insured does not reveal the fact at the time he secures insurance on his property that oil is habitually kept on the premises where it is situated or contiguous thereto, it may be such a misrepresentation as will avoid his policy. Such was held to be the case where the diagram of the property furnished by the insured and his application did not show that a building was contiguous to the one insured, and that it was used as a place for painting barrels, benzine being used and kept in it.[45]

§ 793. Warranty.—Hazard not increased.

The description in a policy may amount to a warranty that the contents of the store insured are not hazardous merchandise. If such is the case, the keeping of a small quantity of the goods declared in the policy to be hazardous will avoid the policy, although the risk be not thereby increased. Such was the case where the goods were described in the policy as a "stock in trade, consisting of not hazardous merchandise," and providing that if the store should be used for carrying on or exercising any trade or business or keeping merchandise denominated hazardous in the terms of the policy, or if the risk should be increased with the consent of the assured, it should be void.[46]

§ 794. Particular use allowed.

If a policy provides that petroleum shall not be kept or used on the premises except for lighting purposes, the keeping or using of it on the premises as a fuel will avoid the policy.[47]

§ 795. Extent of prohibiting usage.

As a rule, the amount of use of the prohibited product is immaterial. Thus the temporary use of naphtha on a single occa-

[45] McFarland v. Peabody Ins. Co., 6 W. Va. 425.

[46] Richards v. Protection Ins. Co., 30 Mo. 273.

[47] White v. Western, etc., Co., 18 W. N. C. (Pa.) 279; 6 Atl. Rep. 113.

But specifications how kerosene

sion was held to avoid the policy.[48] Where no inquiry was made by the company at the time it issued a policy concerning the use of gasoline on the premises, the use of it thereafter in contravention of a prohibitory clause in the policy will avoid such policy, although it was used when the policy was issued.[49]

§ 796. Occasional use of hazardous articles.

It has been held that the occasional use of articles denominated hazardous would not avoid a policy conditioned against their use.[50] The temporary use of benzine to renovate furniture and carpets will not avoid a policy, although the risk thereby be increased contrary to its terms.[51] Where permission was given to use gasoline stoves, providing the assured warranted that no gasoline should be kept within the building except that contained in the reservoir or stove, it was held that the keeping of a gallon gasoline can with gasoline in it, in the pantry next the kitchen where the stove was kept was a violation of the terms of the policy.[51a] But where the keeping of gasoline was prohibited, the keeping of a half pint of it in a bottle securely corked and which was not the cause of the fire, was held not sufficient to avoid the policy.[51b]

oil shall be handled when used for lighting purposes has no reference to its use in heaters. Phœnix Ins. Co. v. Fleenor, 104 Ark. 119; 148 S. W. 650.

[48] Wheeler v. Traders' Ins. Co., 62 N. H. 326, 450. (But it should be remarked that the naphtha was used in this case several times, and a cask of it was taken on the premises.) Matson v. Farm Building Fire Ins. Co., 73 N. Y. 310; 29 Am. Rep. 149, reversing 9 Hun 415; Heron v. Phœnix, etc., Ins. Co., 180 Pa. St. 257; 40 W. N. C. 55; 36 Atl. Rep. 740; 36 L. R. A. 517.

A casual deposit of the prohibited article in the building was held not to avoid the policy. Hynds v. Schenectady, etc., Ins. Co., 11 N. Y. 554; affirming 16 Barb. 119; Springfield, etc., Ins. Co. v. Wade, 95 Tex. 598; 68 S. W. Rep. 977 (a gallon on the premises a half day and which caused the fire; policy not avoided).

[49] McFarland v. St. Paul, etc., Ins. Co., 46 Minn. 519; 49 N. W. Rep. 253.

[50] Merchants', etc., Ins. Co. v. Washington, etc., Ins. Co., 1 Handy 408; La Force v. Williams, etc., Co., 43 Mo. App. 518.

[51] Bently v. Lumberman's Ins. Co., 191 Pa. St. 276; 43 Atl. Rep. 209.

[51a] Norwaysz v. Thuringia Ins. Co., 204 Ill. 334; 68 N. E. Rep. 551; 104 Ill. App. 390.

[51b] Arnold v. American Ins. Co., 148 Cal. 660; 84 Pac. Rep. 182.

§ 797. Increase of risk.

Not infrequently policies provide that any increase of the hazard assumed by the insurer shall avoid the policy. Whether or not the particular thing done, and which it is insisted avoids the policy, increased the hazard is a question for the jury.[52] Where the policy provided that it should be void if the hazard was increased, or any of the products of petroleum of a greater inflammability than kerosene were used or kept on the premises; and when the policy was issued the insured was using coal as a fuel, and afterwards he substituted for the coal a "reduced oil" of less inflammability than kerosene, it was held that the only question was as to the method of using the oil, and whether the hazard was thereby increased.[53] A clause in a policy avoided it if there was an increase of the hazard. For several months before the fire the insured kept in a room where the merchandise insured was situated, a jug containing crude petroleum for medical purposes. The petroleum did not cause and had nothing to do with the fire; but the evidence tended to show that its presence was dangerous, and tended to increase the risk. It was held error for the court to refuse to charge the jury that if the risk was actually and materially increased it avoided the policy.[54] Evidence is admissible to show that the occupation of the premises for finishing chairs, wherein an alcohol lamp was used and exploded, causing the fire, that the risk was thereby increased.[55] A policy prohibiting the keeping of baled hay is avoided by keeping large quantities of loose unbaled hay; for the reason that loose hay is more hazardous than baled hay.[56] To put up a frame building near the one insured in which is placed an incubator heated by the use of gasoline or kerosene as a fuel is to increase the risk of the insurer.[57] Where gasoline had been kept in violation of the terms

[52] Pool v. Milwaukee, etc., Ins. Co., 91 Wis. 530; 65 N. W. Rep. 54; Williams v. People's Fire Ins. Co., 57 N. Y. 274; Atherton v. British, etc., Co., 91 Me. 289; 39 Atl. Rep. 1006.

[53] Grand Rapids, etc., Co. v. American Fire Ins. Co., 93 Mich. 396; 53 N. W. Rep. 538.

[54] Williams v. People's Fire Ins. Co., 57 N. Y. 274.

[55] Appleby v. Astor Fire Ins. Co., 54 N. Y. 253.

[56] Dittmer v. Germania Ins. Co., 23 La. Ann. 458; 8 A. M. Rep. 600.

[57] Yentzer v. Farmers', etc., Ins. Co., 200 Pa. St. 325; 49 Atl. Rep. 767.

of the policy, but at the time of the fire none was on the premises, it was held to be a question of fact, on which the testimony of experts was admissible, whether the risk had been increased; and the effect of the changed condition on the premium rate which should have been charged by underwriters generally for the insurance of the property may be shown as bearing on the issue, though it is not conclusive.[58]

§ 798. Proof of custom or the usual practice.

As a rule, proof is admissible to show what was the custom or usual practice with reference to the keeping of prohibited articles where it is claimed that the nature of the property insured was such that the articles prohibited were a necessary part of the whole. As in the case of a country store, proof is admissible, in an action on the policy, to show custom or practice with reference to the keeping of prohibited articles, such as gasoline.[59] But if there is an express provision that a certain oil shall not be kept or permitted on the premises, then the keeping of it for trade will avoid the policy.[60]

§ 799. Implied consent to prohibited use.—Custom.

An implied consent to use the buildings in a manner prohibited by the policy may be drawn from the use to which the building was being put at the time the policy was issued, or

[58] Traders' Ins. Co. v. Catlin, 163 Ill. 256; 45 N. E. Rep. 255, reversing 59 Ill. App. 162. See Cornish v. Farm, etc., Ins. Co., 74 N. Y. 295; Planters, etc., Ins. Co. v. Rowland, 66 Md. 236; 7 Atl. Rep. 257; Luce v. Dorchester, etc., Ins. Co., 105 Mass. 297; Lietch v. Atlantic, etc., Ins. Co., 66 N. Y. 100.

[59] American, etc., Ins. Co. v. Green, 16 Tex. Civ. App. 531; 41 S. W. Rep. 74; Mascott v. Granite, etc., Ins. Co., 68 Vt. 253; 35 Atl. Rep. 75; Maril v. Connecticut Fire Ins. Co., 95 Ga. 604; 23 S. E. Rep. 463; 30 L. R. A. 835; Hall v. Insurance Co., 58 N. Y. 292; 17 Am. Rep. 255; Citizens' Ins. Co. v. McLaughlin, 53 Pa. St. 485; Tubb v. Liverpool, etc., Ins. Co., 106 Ala. 651; 17 So. Rep. 615; McClure v. Mutual Fire Ins. Co., 242 Pa. 59; 88 Atl. 921; Bouchard v. Dirige Mut. Fire Ins. Co., 113 Me. 17; 92 Atl. 899; Gropper v. Home Ins. Co., 77 Misc. Rep. 132; 135 N. Y. Supp. 1028.

[60] Birmingham Fire Ins. Co. v. Kroegher, 83 Pa. St. 64; 24 Am. Rep. 147. In this case a barrel of petroleum was kept for sale in a store.

from the nature of the stock insured. Thus where keeping gunpowder was prohibited, yet the store insured was such a store as usually contains gunpowder for retail; and at the time the policy was issued the insurance agent knew gunpowder was actually kept for that purpose in the store, it was held that the keeping of the amount usually carried by retail storekeepers did not avoid the policy.[61] So where a policy placed with a silver plating company on its stock and machinery in its factory, provided "that the entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void (anything contrary, notwithstanding) if there be kept, used, or allowed on the above described premises . . . gasoline," was held not to prohibit the use of gasoline in the company's business, it being so used at the date of the policy, and the use being necessary. The fact that only such amount was brought into the factory at any one time as was used in a single day seems to have had some bearing on the decision.[62] A policy containing a provision declaring it to be void if gasoline be "kept, used or allowed" on the premises does not prohibit the keeping in the building gasoline to be used in filling gasoline torches for use in removing paint from the building, in order to repaint it.[63] Under a policy placed on household and kitchen furniture and family stores, a clause prohibiting gasoline on the premises will not prevent the use of gasoline in the kitchen gasoline stoves, it being shown that household and kitchen furniture ordinarily include gasoline and gasoline stoves.[64] It was held that the prohibitory clause was repugnant

[61] Kenton Ins. Co. v. Downs, 90 Ky. 236; 13 S. W. Rep. 882; Mascott v. Granite, etc., Ins. Co. (Vt.), 35 Atl. Rep. 75; Phœnix Ins. Co. v. Flemming, 65 Ark. 54; 44 S. W. Rep. 464; 39 L. R. A. 789; Maril v. Connecticut Fire Ins. Co., 95 Ga. 604; 23 S. E. Rep. 463; Stout v. Commercial, etc., Co., 12 Fed. Rep. 554; 11 Biss. 309; 11 Ins. L. J. 688. See Sperry v. Springfield, etc., Ins. Co., 26 Fed. Rep. 234; 15 Ins. L. J. 270; and Steinbach v. Relief Ins. Co., 77 N. Y. 498, affirmed 13 Wall 183; Steinbach v. Lafayette Ins. Co., 54 N. Y. 90.

[62] Fraim v. National Fire Ins. Co., 170 Pa. St. 151; 37 W. N. C. 39; 32 Atl. Rep. 613; Northern, etc., Co. v. Crawford, 24 Tex. Civ. App. 574; 59 S. W. Rep. 916.

[63] Smith v. German Ins. Co., 107 Mich. 270; 65 N. W. Rep. 236; Ackley v. Phœnix Ins. Co., 25 Mont. 272; 64 Pac. Rep. 665.

[64] American, etc., Ins. Co. v. Green, 16 Tex. Civ. App. 531; 41 S. W. Rep. 74; Snyder v. Dwelling

to the general tenor of the policy when applied to the articles insured.[65] Where a policy on a store prohibited the use of any burning fluid or chemical oils, and a subsequent clause permitted the use of kerosene oil as a light in the dwelling part of the building, the use of kerosene in the store rendered the policy void, although the owner slept in the store with his clerk, and kept the kerosene lamps burning as a protection against burglars.[66] A house was insured and then changed into a grocery, in which articles were sold which were denominated "hazardous." This was held to avoid the policy.[67] But keeping gasoline in a pint bottle on a shelf near a gasoline engine to start it with, the main quantity of the gasoline being kept in a separate building not covered by the policy, is a keeping in a small quantity and for incidental use, and is not a violation of a policy inhibiting the keeping of gasoline on the premises, which the insured agent knew were occupied for manufacturing purposes and operated by the engine.[67a] In an action on a policy covering a merchant tailor stock, the insured may show the understanding of the parties using the term "the stock of a merchant tailor," to show that the keeping of a small quantity of benzine was contemplated.[67b] So a policy will not be construed to prohibit a customary use of a gasoline engine to drive threshing machinery if possible.[67c]

§ 800. "Storing."—"Keeping."

Fire insurance policies usually prohibit the storing of oils upon the premises of the property insured; and not infrequently

House Ins. Co., 59 N. J. L. 544; 37 Atl. Rep. 1022; Bouchard v. Dirigo Mut. Fire Ins. Co., 113 Me. 17; 92 Atl. 899; McClure v. Mutual Fire Ins. Co., 242 Pa. 59; 88 Atl. 921.

[65] It is different if fireworks are kept in the dwelling house. Heron v. Phœnix, etc., Ins. Co., 180 Pa. St. 257; 40 W. N. C. 55; 36 Atl. Rep. 740; 36 L. R. A. 517.

[66] Cerf v. Home Ins. Co., 44 Cal. 320; 13 Am. Rep. 165.

[67] Davern v. Merchants', etc., Ins. Co., 7 La. Ann. 344.

[67a] Gump v. National, etc., Ins. Co., 34 Ohio Cir. Ct. 36, affirmed 85 Ohio St. 325; 99 N. E. 1130.

Gasoline in reservoirs of automobiles, held not to avoid the policy on the garage. O'Neil v. Caledonian Ins. Co., 166 Cal. 310; 135 Pac. 1121.

[67b] Gropper v. Home Ins. Co., 77 Misc. Rep. 132; 135 N. Y. Supp. 1028.

[67c] Bouchard v. Dirigo Mut. Fire Ins. Co., 113 Me. 17; 92 Atl. 899.

the question arises what is a "storing" of oil. Usually the keeping of enough oil for the retail trade, as retailers are in the habit of doing, will not avoid a policy prohibiting the "storing" of oil. Thus a grocer may keep such oils in reasonable quantities as grocers usually keep and which is incidental to his business, although there be a clause in his policy suspending its operations if oils be stored in the building.[68] Even the keeping of gasoline for retail, in reasonable quantities, will not avoid the policy, although it be denominated extra hazardous as an article of storage.[69] Where the assured is prohibited "from using the premises for the purpose of keeping or storing therein any goods or merchandise of the kind which are denominated hazardous," the keeping of articles in the stock of goods insured which are of a hazardous character, but which are required by the ordinary course of his trade will not avoid the policy, for such a provision is merely a protection against the appropriation of the store for a depository of such goods, as a sole or principal business.[70] In such an instance the keeping of a barrel of oil for a short time in the back of the store, with bunches of cotton yarn near it, was held not to prevent a recovery for loss by fire of the goods insured.[71] A policy denominated flax as hazardous, and provided that the building should not be "appropriated, applied or used" for that purpose. The building insured had been used for flax dressing machinery, but before the policy was issued it had been removed and a cording machinery put in. A small quantity of unbroken flax remained piled up in a corner of a room two days, during which the building was burned. It was held that these facts did not show that the building was "appropriated, applied or used" for storing or keeping flax.[72] A policy provided that if the premises in-

[68] New York, etc., Ins. Co. v. Langdon, 6 Wend. 623; Langdon v. New York, etc., Ins. Co., 1 Hall (N. Y.) 226; Maril v. Connecticut Fire Ins. Co., 95 Ga. 604; 23 S. E. Rep. 463; 51 Am. St. Rep. 102; 30 L. R. A. 835.

[69] Renshaw v. Missouri, etc., Ins. Co., 103 Mo. 595; 15 S. W. Rep. 945; 23 Am. St. Rep. 904; Columbia, etc., Co. v. American Fire Ins. Co., 59 Mo. App. 204; Ackley v. Phœnix Ins. Co., 25 Mont. 272; 64 Pa. Rep. 665.

[70] Moore v. Protection Ins. Co., 29 Me. 97; 48 Am. Dec. 514; Phœnix Ins. Co. v. Taylor, 5 Minn. 492.

[71] Leggett v. Aetna Ins. Co., 10 Rich. L. 202.

[72] Hynds v. Schenectady, etc., Ins. Co., 16 Barb. 119, affirmed 11 N. Y. 554.

sured "be used for the purpose of carrying on any trade, business or vocation denominated hazardous, or extra hazardous, or specified in the memorandum of special rates in the proposals annexed to the policy, or conditions denominated hazardous or extra hazardous, or included in the special rates, that the policy, while the premises were so used, should be of no effect," and in the conditions oil and turpentine were denominated hazardous, and spirits of turpentine extra hazardous, and houses, buildings or repairing were included within the memorandum of special rates of premiums; it was held that the fact, when the house was burnt, that painters were employed in repairing the house, for painting the inside, and for that purpose these oils were kept in the house, while the work was going on, such a quantity of paints, oil and turpentine did not avoid the policy.[73] A mere privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in reality abandoned, will not justify the insured in keeping and storing gasoline in a place and manner other than that allowed in the policy.[74] Keeping articles to be exhibited or to be used as means and instruments of the exhibition is not a use of the building "for the purpose of storing or keeping therein" such articles within a clause of the policy relating to hazardous articles.[75] In a Massachusetts case it was said that "the word 'kept,' as used in the policy, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period."[76] A provision in a policy prohibiting the keeping of any article considered hazardous was modified by endorsement

[73] O'Neil v. Buffalo Fire Ins. Co., 3 N. Y. 122.

[74] Liverpool, etc., Ins. Co. v. Gunther, 116 U. S. 113; 6 Sup. Ct. Rep. 306.

[75] City of New York v. Hamilton Fire Ins. Co., 10 Bosw. 537.

[76] First Congregational Church v. Holyoke, etc., Ins. Co., 158 Mass. 475; 33 N. E. Rep. 572; 35 Am. St. Rep. 508; 19 L. R. A. 587, citing Williams v. Ins. Co., 31 Me. 219; O'Neil v. Insurance Co., 3 N. Y. 122; Williams v. Insurance Co., 54 N. Y. 569; 13 Am. Rep. 620; Mears v. Insurance Co., 92 Pa. St. 15; Putnam v. Insurance Co., 18 Blatchf. 368; 4 Fed. Rep. 753.

upon as follows: "Permission given to keep one barrel of benzine or turpentine in tin cans . . . for use on the premises." One barrel of benzine was brought into the building, and exploded while being emptied into a large tin can, causing the building to be destroyed by the fire the explosion started. It was held that the temporary bringing in of the barrel of benzine was not a "keeping of benzine" in violation of the terms of the policy.[77] It may be laid down as a general proposition that the usual clauses in fire insurance policies prohibiting the storing or keeping of certain hazardous articles have reference to a storing or keeping in a mercantile sense in considerable quantities, with a view to sales or traffic, or when storing or keeping is the principal object of the deposit, and not where the keeping is incidental and only for the purpose of consumption.[78] To merely carry gasoline through a store to deliver it at once, is not keeping it on the premises.[79] To keep it on the same lot but in a separate building is not keeping it on the premises.[80] A fire policy stipulated that it should be void if gasoline was kept, used or allowed on the premises, which were used for a restaurant. Gasoline was kept on the premises for use in carrying on the business. Sometimes gasoline was delivered at the restaurant for use in it and in the business of insured in another building; but the quantity used in such other business was not kept in the restaurant, but was sent to such other building. It was held that the gasoline so sent out was not "kept, used, or allowed" on the premises insured.[80a] Gasoline is not "stored" within the terms of a policy by the keeping of a small quantity of it in a closed retainer for

[77] Maryland Fire Ins. Co. v. Whiteford, 31 Md. 219.

[78] Williams v. Fire Ins. Co., 54 N. Y. 569; 13 Am. Rep. 620.

[79] London, etc., Ins. Co. v. Fischer, 92 Fed. Rep. 500.

[80] Fireman's Fund Ins. Co. v. Shearman, 20 Tex. Civ. App. 343; 50 S. W. Rep. 598. See Rau v. Winchester Fire Ins. Co., 36 N. Y. App. Div. 179; 55 N. Y. Supp. 459.

[80a] American Central Ins. Co. v. Chancey, 60 Tex. Civ. App. 61; 127 S. W. Rep. 577.

occasionally cleaning wearing apparel;[80b] and the use of a gasoline engine in an insured barn for driving the threshing machine does not forfeit a policy having in it a provision prohibiting the keeping or using of combustible fluids.[80c] Five gallons of gasoline were brought to a house while the owner of the house was out and there remained one hour when he discovered it and directed it to be removed, which was done. It was held that he had not forfeited his policy, for it had not been "stored" on the premises.[80d]

§ 801. Store.

Litigation over what is prohibited in policies placed on a "country store" has been sharp and severe. These risks are considered rather hazardous. A policy placed on such a store is not avoided by the keeping of gunpowder and coal oil under a provision prohibiting the keeping of such articles, where it is shown that such articles are usually kept in such a store.[81] A policy insured a building occupied as a store and the merchandise permitted to be kept in it was such as was "usually kept in a country store," except as was otherwise provided in the policy. The clause "usually kept in a country store" was written in ink. In the policy was a printed clause to the effect that unless otherwise provided by agreement indorsed on it, it should be void if (any usage of trade to the contrary) gasoline was kept on the premises. The court held that if gasoline was an article usually kept in a country store, during the daytime, for sale, the keeping of it on the premises for that purpose did not avoid the policy.[82] A policy placed on a stock of goods

[80b] Hanover Fire Ins. Co. v. Eisman, 45 Okl. 639; 146 Pac. 214.

[80c] Bouchard v. Dirigo Mut. Fire Ins. Co., 113 Me. 17; 92 Atl. 899.

[80d] Clute v. Clintonville Mut. Fire Ins. Co., 144 Wis. 638; 129 N. W. 661.

[81] American Fire Ins. Co. v. Nugent, 7 Ky. Law Rep. 597; Leggett v. Aetna Ins. Co., 10 Rich. Law 202.

[82] Yoch v. Home Mutual Ins. Co., 111 Cal. 503; 44 Pac. Rep. 189; 34

in a country store contained a printed stipulation, that benzine should not be kept without the consent of the insurer, but a written clause provided that the policy covered such goods "as is usually kept for sale in country stores." It was held that proof was admissible to show that the prohibited goods came within the written clause.[83] A clause in a policy rendering it void if gasoline be kept on the premises was held to apply to where it was brought to the store to be used in a gasoline stove in an upstairs room, having no connection with the store, but reached by an outside stairway.[84]

§ 802. Grocery.

If a policy placed on a stock of groceries kept for retail prohibit the use of the building insured for the purpose of storing goods denominated hazardous or extra hazardous, the keeping of oil for the purpose of retail, in quantities not unusually large, is not a storing of oil within the prohibitory clause of the policy.[85] A policy provided that it should be void if the premises were used for storing or keeping on the premises any article mentioned in the classes of hazards annexed to it, "except as herein specially provided for, or hereafter agreed to by the insurer in writing upon this policy." The court found, the goods having been insured as "groceries," that the term "groceries" included a certain amount of such hazardous articles, and held that they were so especially provided for in writing on the policy.[86] A policy on a stock of merchandise prohibited the keeping of petroleum on the premises. The insured kept a barrel of petroleum on the premises for sale; and the insur-

L. R. A. 857; Barnard v. National Fire Ins. Co., 27 Mo. App. 26; Mechanics', etc., Ins. Co. v. Floyd, 20 Ky. L. Rep. 1538; 49 S. W. Rep. 543.

[83] Tubb v. Liverpool, etc., Ins. Co., 106 Ala. 651; 17 So. Rep. 615.

[84] Boyer v. Grand Rapids Fire Ins. Co., 124 Mich. 455; 83 N. W. Rep. 124.

[85] Langdon v. New York, etc., Ins. Co., 1 Hall (N. Y.) 226; Renshaw v. Missouri State, etc., Ins. Co., 103 Mo. 595; 15 S. W. Rep. 945; 23 Am. St. Rep. 904; New York, etc., Ins. Co. v. Langdon, 6 Wend. 623; London, etc., Ins. Co. v. Fischer 92 Fed. Rep. 500.

[86] Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

ance company insisted that this avoided the policy. The court instructed the jury that "merchandise" included whatever it was customary to keep in such a store, and, if a supply of petroleum, such as was kept on the premises, was a part of the usual stock of the store, the insured could recover. This was held error, for the reason that by the express contract petroleum was to be excluded.[87] Where, after a policy was issued on a dwelling house, a grocery was established in it, in which articles were sold that were denominated "hazardous" in the memorandum attached to the policy, it was held, on a loss by fire, that the insured was not entitled to recover.[88]

§ 803. Watchmaker.

Where a policy is issued on "watchmaker's materials," it may be shown by parol evidence that the words include small amounts of benzine and kerosene, although the policy contains a printed stipulation preventing the keeping and use of inflammable substances.[89] The same is true of a manufacturer of brass clock works.[90]

§ 804. Furniture store.— Wagonshop.

The keeping of benzine for necessary use in a repair shop connected with a retail furniture store will not avoid a policy covering the store and shop and the "furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store," although benzine is expressly prohibited in the printed conditions of the policy.[91] So where a paintshop

[87] Birmingham Fire Ins. Co. v. Kroegher, 83 Pa. St. 64; 24 Am. Rep. 147. To same effect Whitmarch v. Charter Oak Fire Ins. Co., 2 Allen 581; Cerf. v. Home Ins. Co., 44 Cal. 320; 13 Am. St. Rep. 165.

[88] Davern v. Merchants', etc., Co., 7 La. Ann. 344.

[89] Maril v. Connecticut Fire Ins. Co., 95 Ga. 604; 23 S. E. Rep. 463; 30 L. R. A. 835; 51 Am. St. Rep. 102.

[90] Bryant v. Poughkeepsie, etc., Ins. Co., 17 N. Y. 200, affirming 21 Barb. 154.

[91] Faust v. American, etc., Ins. Co., 91 Wis. 158; 64 N. W. Rep. 883; 30 L. R. A. 783.

A policy on a furniture store covers paints and varnish used to finish the furniture, if usually kept by dealers. Haley v. Dorchester, etc., Ins. Co., 12 Gray 545.

was kept over a wagonshop, both owned by the insured and operated together; and half a barrel of benzine was kept in the shop, it was held that the printed condition prohibiting the keeping of benzine was repugnant to the written clause insuring them.[92]

§ 805. Factory.

The use of gasoline in a factory, in the business of the factory owner, such use being necessary, where only enough is kept as will be sufficient for a short time — as for a day — will not avoid a policy prohibiting the use of gasoline in such factory. Such was held to be the case where the policy was issued to a silver plating company on its tools and machinery in the factory.[93] In the case of a rope factory, where the policy provided that no oil should be used on the premises, the use of fish oil, which was necessary for the manufacture of a particular kind of rope manufactured in the factory, was held not to avoid the policy.[94] A manufacturer of brass clock works may keep all articles necessary to and usually employed in that manufacture, although keeping such articles is set forth in the printed terms of the policy as extra hazardous.[95] And this is true of any factory under a like policy.[96]

§ 806. Drug Store.

A policy issued on a drug store insuring "articles usually kept for retail drug stores" covers gasoline, benzine, and ether. The keeping of such articles in reasonable quantities on the insured premises will not avoid the policy, though a printed con-

[92] Archer v. Merchants', etc., Co., 43 Mo. 434.

[93] Fraim v. National Fire Ins. Co., 170 Pa. St. 151; 32 Atl. Rep. 613; 37 W. N. C. 39; Mears v. Humboldt Fire Ins. Co., 92 Pa. St. 15; 37 Am. Rep. 647.

[94] Baumgardner v. Ins. Co., 1 W. N. C. 119.

[95] Bryant v. Poughkeepsie, etc., Ins. Co., 17 N. Y. 200, affirming 21 Barb. 154; Maril v. Connecticut Fire Ins. Co., 95 Ga. 604; 23 S. E. Rep. 463; 30 L. R. A. 835.

[96] Viele v. Germania Ins. Co., 26 Iowa 9; 96 Am. Dec. 83.

dition in it declares that unless otherwise provided by agreement endorsed on or added to it, the policy shall be void if there be kept benzine, ether, or gasoline, notwithstanding any custom or usage of trade may permit them to be kept.[97] Where a wholesale and retail drug store was kept in the same building separated only by a thin partition, and a policy was issued "on their wholesale stock of drugs, paints, oils, dyestuffs, and other goods on hand for sale, not more hazardous, while contained in the building," it was held that the word "wholesale" was supplemented, and its meaning extended to "other goods on hand for sale," not simply of the wholesale stock, but all other goods "contained in the building."[98]

§ 807. Laundry.

The operation of a laundry is not a trade or manufacture within a clause in a policy forbidding the use of gasoline, notwithstanding any custom of trade or manufacture, so as to preclude proof of a custom of the use of gasoline by the residents of the community at the time the policy was issued, to explain or avoid such prohibitory clause.[99]

§ 808. Patent Leather Factory.

A policy placed on a patent leather factory allowed benzole to be kept in a shop detached from the building, and, as needed, carried into the factory. Evidence was admitted of the custom in other cities as to the way in which benzole was ordinarily carried into the factory, there being no evidence of a different custom employed at the place where the factory was located.[100]

[97] Ackley v. Phœnix Ins. Co., 25 Mont. 272; 64 Pac. Rep. 665; Phœnix Ins. Co. v. Flemming, 65 Ark. 54; 44 S. W. Rep. 464; 39 L. R. A. 789.

[98] Wilson Drug Co. v. Phœnix, etc., Co., 110 N. C. 350; 14 S. E. Rep. 790.

[99] Northern, etc., Co. v. Crawford, 24 Tex. Civ. App. 574; 59 S. W. Rep. 916.

[100] Citizens' Ins. Co. v. McLaughlin, 53 Pa. St. 485.

§ 809. Painter.—Paintshop or factory.

A policy issued to a painter, keeping nothing except his productions, or his paints, oils, brushes, and other "merchandise," covers articles of necessity and convenience, though they are not kept for sale.[101] A written rider attached to a policy provided that the insurance was against loss on "paints, oils, varnishes," etc., "and such other articles as are usually kept in a sign painter's and carriage painter's and trimmer's shop." A printed clause in the body of the policy provided that "this entire policy, unless otherwise provided by agreement thereon, or added hereto, shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed, on the above described premises, benzine," etc. It appeared in evidence that benzine was usually kept in . . . a shop such as the one insured. It was held that the prohibition with respect to benzine applied only when the article was not insured, and by insuring the benzine it was "otherwise provided, by agreement indorsed on the policy" that benzine might be kept on the premises.[102] If the written part of a policy on a paint factory provides that it may be used for "hazardous or extra hazardous" purposes, it will control the printed part prohibiting the keeping of benzine; and the premises may be used as a paint factory in which benzine is used to manufacture paints.[103]

§ 810. Torch to remove paint from house.

A policy provided that naphtha should not be used on the premises. The owner of the house employed a painter to paint the house, and he, with the consent of the owner, used a naphtha torch to remove the paint on the house preparatory to repainting it. The building caught fire from the torch and was consumed. Another provision in the policy provided that the circumstances

[101] Hartwell v. California Fire Ins. Co., 84 Me. 524; 24 Atl. Rep. 954.

[102] Mascott v. Granite, etc., Ins. Co., 68 Vt. 253; 35 Atl. Rep. 75; Mascott v. First, etc., Ins. Co., 69 Vt. 116; 37 Atl. Rep. 255.

[103] Russell v. Manufacturers', etc., Ins. Co., 50 Minn. 409; 52 N. W. Rep. 906.

affecting the risk should not be so altered as to cause an increase of such risk. It was held that there was an alteration of "the situation or circumstances affecting the risk" within the meaning of the condition above stated; that the risk had been increased; that although no naphtha was used in the house, it was used "on the premises" within the meaning of the prohibitory clause; that the only question for the jury was whether the use of the naphtha and the change in conditions affecting the risk occurred through making ordinary repairs in a proper and reasonable manner, since such a provision in a policy is not intended to prevent the making of such repairs by proper means; that a finding of the jury that the method used was "the method ordinarily pursued to remove paint on the outside of a building preparatory to scraping it off, to paint it," is not equivalent to an affirmative finding on such question, for it assumes that the removal of the old paint was reasonably necessary, and that the particular building, as to the danger arising from moving the flaming torch all over its external surface, was like ordinary buildings; that the insurance company could show by an expert that the rates on a building where paint is to be removed from the outside by the use of a torch would have been higher than if there was to be no such use; that an expert may not testify as to the actual effect of the use of naphtha in reference to danger from fire, and that it was proper to admit the testimony of an expert as to the proper and usual way of removing paint from a building.[104] But where a policy provided that it should be void if gasoline be "kept, used, or allowed" on the premises, it was held that keeping it in the building to be used in filling gasoline torches for use in removing paint from the building, in order to repaint it, did not avoid the policy;[105] and under a provision forbidding the keeping of gasoline on the premises, where a fire occurs from the use of a gasoline torch in the burning off of old paint, such use will not prevent a finding for the insured.[105a]

[104] First Congregational Church v. Holyoke, etc., Ins. Co., 158 Mass. 475; 33 N. E. Rep. 572; 35 Am. St. Rep. 508; 19 L. R. A. 587.

[105] Smith v. German Ins. Co., 107 Mich. 270; 65 N. W. Rep. 236; 30 L. R. A. 368.

[105a] Lebanon County v. Franklin Fire Ins. Co., 237 Pa. 360; 85 Atl. 419.

§ 811. Cleaning clothes.—Destroying vermin.

A policy on a dwelling house prohibiting the use of gasoline does not prohibit the use of gasoline in small quantities by members of the insured's family for the purpose of cleaning their clothes,[106] or destroying vermin.[107]

§ 812. Cleaning or lubricating machinery.

Temporarily keeping on the premises small quantities of benzine to use in cleaning machinery and needful light will not avoid a policy prohibiting the keeping on the premises benzine.[108] Where oil was in constant use in the shop to lubricate the machinery, according to the common usage, and the insurer knew that practice, it was held that the insurer must have contracted with reference to the practice, and that it was bound even though oil thereafter was used for that purpose and the policy expressly prohibited the keeping or using of oil on the premises.[109]

§ 813. Waiver by knowledge or acquiescence in use of building.

The knowledge of the company of the use the building was being put to at the time the policy is placed upon it may amount to a waiver of the prohibitory clause inserted in the policy; for in such an instance the insurance company cannot successfully contend that the policy was avoided by the use of the building in the manner prohibited in the policy. To do so would be to practically deny, often, that the policy was ever in force. Thus a policy placed on a factory prohibited the use of petroleum. At the time it was written the agent of the company knew that the factory was to be run at night and lighted by "headlight oil," a product of petroleum; and it was held that the condition should be deemed to have been waived

[106] Columbia, etc., Co. v. American Fire Ins. Co., 59 Mo. App. 204.

[107] La Force v. Williams City Fire Ins. Co., 43 Mo. App. 518.

[108] Mears v. Humboldt Ins. Co., 92 Pa. St. 15; 37 Am. Rep. 647. See O'Neil v. Buffalo Ins. Co., 3 N. Y. 122.

[109] Carlin v. Western, etc., Co., 57 Md. 515; 40 Am. Rep. 440.

by the company.[110] If the agent knows that the prohibited article is kept and is to be kept on the premises, the policy will not be avoided.[111] A policy prohibited the keeping of gunpowder in the building insured, without a written permission, and it also contained a clause that nothing less than a distinct agreement, endorsed on the policy, should be construed a waiver of any condition or restriction. At the time of the loss the assured had a few pounds of gunpowder, which was kept in the insured building with the knowledge and express consent of the insuring company's local agent. A policy had been issued by the same company on the same building, and the same agent who knew gunpowder was kept in the building, and that all premiums had been paid to and accepted by the company, expressly permitted the keeping of the powder without calling the assured's attention to the prohibitory clause. It was held that the failure of the assured to have the written consent of the company indorsed, on the policy, under the circumstances, did not render it void, for the condition had been waived.[112] Where an insurance company issued a policy on a woollen mill and its contents, knowing at the time that naphtha was used and was necessarily used in the business, it waived a printed condition of the policy that it should be void if the assured uses naphtha; and after a loss the company was held estopped from setting up the use of naphtha to defeat a recovery on the policy.[113] If the application shows the nature of the business carried on in the building insured, and it is such a building as indicates the character and the nature of the article to be kept in the building, so that the nature and extent of the risk must have been

[110] Couch v. Rochester, etc., Ins. Co., 25 Hun. 469; Rivara v. Queen's Ins. Co., 62 Miss. 720; Farmers', etc., Ins. Co. v. Nixon, 2 Colo. App. 265; 30 Pac. Rep. 42; Kruger v. Western, etc., Ins. Co., 72 Cal. 91; 13 Pac. Rep. 156; Gump v. National, etc., Ins. Co., 34 Ohio Cir. Ct. 36, affirmed 85 Ohio St. 325; 99 N. E. 1130; Caledonian Ins. Co. v. Indiana Reduction Co. (Ind. App.), 115 N. E. 596.

[111] Peoria, etc., Ins. Co. v. Hall, 12 Mich. 202; Kenton Ins. Co. v. Downs, 90 Ky. 236; 13 S. W. Rep. 882; 12 Ky. L. Rep. 115. *Contra*, Western, etc., Co. v. Rector, 85 Ky. 294; 3 S. W. Rep. 415; 9 Ky. L. Rep. 3; Bartholomew v. Merchants' Ins. Co., 25 Ia. 507; 96 Am. Dec. 65; American Fire Ins. Co. v. Nugent, 7 Ky. Law Rep. 597.

[112] Reaper City Ins. Co. v. Jones, 62 Ill. 458.

[113] Wheeler v. Traders' Ins. Co. (N. H.), 1 Atl. Rep. 293.

known to the insurers to embrace articles and pursuits specified as extra hazardous, the carrying on of a business in the building designated as extra hazardous will not avoid the policy.[114] A policy issued by a foreign insurance company prohibited the storing in the building insured petroleum in excess of five gallons without permission first endorsed on the policy. After the policy was issued, the company's local agent gave the insured verbal permission to keep on the premises more than five gallons. A loss occurred under the policy, but not from the keeping of the petroleum. In a suit on it there was evidence of a mutual mistake of the insured and the agent as to the prohibitory clause in the policy; and it was held that it was proper to submit the case to the jury on the ground of estoppel caused by such mistake, as the agent alone could act in the State where the policy was issued.[115]

§ 814. Waiver by knowledge of acquiescence in use of building continued.

Notwithstanding the cases cited in the previous section, it cannot be said that knowledge of the use the building is put to, at the time the policy is issued, will always prevent its forfeiture; nor can it be said that the cases are harmonious on the question. Thus where a policy was issued on a country store in which gunpowder was at the time habitually kept and intended to be kept, to the insurance agent's knowledge, who also represented that the provisions of the policy did not prevent the insured keeping it, it was held that the policy was avoided because of a clause in it prohibiting the keeping of gunpowder and avoiding it if powder was kept in the building covered by the policy.[116] Where a policy on a stock of hardware and stoves provided that no gasoline should be used or kept on the prem-

[114] City of New York v. Brooklyn Fire Ins. Co., 41 Barb. 231.

[115] Queen's Ins. Co. v. Harris (Pa.), 2 Wkly. N. C. 220.

The agent of an insurance company may waive a condition in the policy prohibiting the use of gasoline for lighting purposes. Merchants' Ins. Co. v. Oberman, 99 Ill. App. 357.

[116] Western, etc., Co. v. Rector, 85 Ky. 294; 3 S. W. Rep. 415; 9 Ky. L. Rep. 3; American Central Ins. Co. v. Chancey, 60 Tex. Civ. App. 61; 127 S. W. 577. *Contra*, Peoria, etc., Ins. Co. v. Downs, 90 Ky. 236; 13 S. W. Rep. 882; 12 Ky. L. Rep. 115; Birmingham Fire Ins. Co. v. Kroegher, 83 Pa. St. 64; 24 Am. Rep. 147.

ises, and avoided it if it were so kept, and also provided that no representative of the company could waive the use of its provisions, except in certain cases by indorsement on the policy, it was held avoided by the use of small quantities of gasoline from time to time to illustrate the operation of gasoline stoves offered for sale, although the local agent taking the application and also the local board of underwriters, of which the insurance company or its agents were members, knew of the practice of the assured.[117] The consent of a local agent, whose authority is limited to soliciting insurance, delivering policies, and receiving premiums, to change the use of a building and use it for a restaurant, which included the use of a gasoline stove, will not amount to a waiver of the terms of the prohibitory clause.[118] The fact that the company knew there were no gas fixtures in the house insured, and that the occupant immediately preceding the issuance of the policy used a spirit lamp for lighting such house, was held not to constitute a waiver of the clause in the policy forbidding the use of spirit gas.[119] Where the insured had kept fireworks in another store, knowledge of the insurance agent of this fact at the time the policy was issued, was held to be no waiver of a clause in the policy prohibiting the keeping of them in the building insured.[120] If there is nothing in the application or description of the property which necessarily implies or indicates the use to which it is or will be put, the insurance company will not waive a condition in a policy prohibiting the use of gasoline, nor consent to an existing use which could have been ascertained by reasonable investigation.[121] The fact that the rate charged was the same as that charged for an adjoining building, which included a charge for the use of gasoline, will not estop the insurance company from claiming

[117] Fischer v. London, etc., Ins. Co., 83 Fed. Rep. 807; affirmed, 92 Fed. Rep. 500; Birmingham Fire Ins. Co. v. Kroegher, 83 Pa. St. 64; 24 Am. Rep. 147.

[118] Garretson v. Merchants', etc., Co., 81 Iowa 727; 45 N. W. Rep. 1047.

[119] Minzesheimer v. Continental Ins. Co., 5 Jones and S. (N. Y.) 332.

[120] Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366.

[121] McFarland v. St. Paul, etc., Ins. Co., 46 Minn. 519; 49 N. W. Rep. 253.

a forfeiture for a breach of the condition against the use of gasoline, on the ground that it had constructive notice of such use, the insured not having informed it of the use of the gasoline.[122] A broker procuring insurance for the insured is not the company's agent; and his failure to inform the insured that the use of gasoline will avoid the policy will not estop the company;[123] nor will his knowledge of the use of forbidden articles on the insured premises be a waiver of the forfeiture.[124]

§ 815. Waiver by receiving premium with knowledge of prohibited user.

If a building be used for purposes prohibited by the policy, and, with full knowledge of that fact, the insurer makes and collects assessments on a premium note given for the insurance, he will thereby waive the forfeiture.[125] This is especially true if the agents of the company, at the time the policy was issued, told the insured that an article prohibited by the terms of the policy might be used;[126] or the company, being informed of the prohibited use, declines to fix an increase rate of premiums, and treats the contract as subsisting.[127] And it has been apparently held that a failure to cancel a policy, under a clause allowing the insurer to do so, after he has notice of the prohibited use, will amount to a waiver of the right to defend because of such use.[128]

§ 816. Waiver by adjusting loss or accepting proof without objection.

If there has been a forfeiture by the use or keeping of a prohibited article on the premises, but the adjusting agent objects

[122] Turnbull v. Home Fire Ins. Co., 83 Md. 312; 34 Atl. Rep. 875.

[123] Turnbull v. Home Fire Ins. Co., 83 Md. 312; 34 Atl. Rep. 875.

[124] Kings County Ins. Co. v. Swigert. 11 Ill. App. 590.

[125] Keenan v. Dubuque, etc., Ins. Co., 13 Iowa 375; Caledonian Ins. Co. v. Indiana Reduction Co. (Ind. App.), 115 N. E. 596.

[126] Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418; 38 Am. Rep. 687.

[127] Witte v. Western, etc., Ins. Co., 1 Mo. App. 188.

[128] Farmers', etc., Ins. Co. v. Nixon, 2 Colo. App. 265; 30 Pac. Rep. 42.

to the proofs received solely upon the ground that they are not made out in the form used by the company, and the proofs are then made out on blanks furnished by him, the company will waive its right to insist upon a forfeiture.[129] So if the company require proof at the expense of the insured, without claiming a forfeiture, there will be a waiver.[130] But where the policy had ceased to have any effect by reason of the fact that the insured had kept prohibited articles, it was held that a promise made by an agent, having authority to adjust and pay losses, with knowledge that the prohibited articles had been kept in the house at the time of the fire, was not a waiver that bound the company.[131]

§ 817. Insurance company's right of action to recover damages. Effect of insurance on right of action.

If a company has insured the property destroyed by the negligence of a gas company, and it has paid the loss and become subrogated to the rights of the owner, it may maintain an action to recover damages to the extent of the loss, or at least the amount of the loss, it has paid, where the amount paid is less than the loss sustained.[132] The fact that the property destroyed is fully insured and the loss has been paid, does not prevent the owner recovering damages from the gas company.[133] From a reported case it would seem that subrogation is allowed where an insurance company pays the loss, even though the policy contain no clause of subrogation.[134]

[129] Northwestern, etc., Ins. Co. v. Germania Fire Ins. Co., 40 Wis. 446.

[130] Garrettson v. Merchants', etc., Ins. Co., 81 Iowa 727; 45 N. W. Rep. 1047.

[131] Phœnix Ins. Co. v. Lawrence 4 Metc. (Ky.) 9; 81 Am. Dec. 521.

[132] Indiana, etc., Gas Co. v. New Hampshire, etc., Co., 23 Ind. App. 298; 53 N. E. Rep. 485.

[133] Armbruster v. Auburn Gaslight Co., 18 N. Y. App. 447; 46 N. Y. Supp. 158; Lindsay v. Bridge Water Gas Co., 24 Pittsb. L. J. (N. S.) 276; 14 Pa. Co. Ct. Rep. 181.

[134] German-American Ins. Co. v. Standard Gaslight Co., 34 N. Y. Misc. Rep. 594; 70 N. Y. Supp. 384; 67 N. Y. App. Div. 539; 73 N. Y. Supp. 973. See Commercial Union Fire Ins. Co. v. Lister, 23 Gas J. 364.

§ 818. Gas company causing fire liable to insurance company.

A gas or oil company negligently causing a loss by fire is liable to an insurance company that was liable to pay the owner for the loss. The right of action is based upon the liability of the company to the owner of the property destroyed.[135] The insurance company is subrogated, upon payment of the loss, to all the rights of the insured.[136] If the insured has released the gas or oil company before payment is made by the insurance company, then the latter cannot recover from the gas or oil company causing the damages.[137] If the insured release the wrong-doer from all liability, he thereby releases the insurance company; and if the release is in part, he releases the insurance company to that extent.[138] If the loss is payable to a mortgagee of the property destroyed; and the policy provides that by no act of the owner of the property shall the policy be forfeited, then upon payment of the amount due under the policy, not to exceed the amount due on the mortgage, the insurance company may foreclose the mortgage against the property, if the policy as to such owner was avoided by his act.[139]

[135] Insurance Co. of N. A. v. Fidelity, etc., Co., 125 Pa. St. 523; 16 Atl. Rep. 791; 2 L. R. A. 586; Svea, etc., Co. v. Packham, 92 Md. 464; 48 Atl. Rep. 359; 52 L. R. A. 95.

[136] Insurance Co. of N. A. v. Fidelity, etc., Co., *supra;* Niagara Fire Ins. Co. v. Fidelity, etc., Co., 125 Pa. St. 516; 16 Atl. Rep. 791; Packham v. German Fire Ins. Co., 91 Md. 515; 46 Atl. Rep. 1066; 50 L. R. A. 828; Norwich Fire Ins. Society v. Standard Oil Co., 59 Fed. Rep. 984; 8 C. C. A. 433; 19 U. S. App. 460; Hall v. Nashville, etc., Ry. 13 Wall 367; Sims v. Mutual, etc., Ins. Co., 101 Wis. 586; 77 N. W. Rep. 908; Omaha Ry. Co. v. Granite Ins. Co., 63 Neb. 514; 73 N. W. Rep. 950.

[137] Phœnix Ins. Co. v. Erie, etc., Co., 117 U. S. 312; 6 Sup. Ct. Rep. 750, 1176; Packham v. German Fire Ins. Co., *supra.*

[138] Packham v. German Fire Ins. Co., *supra;* Aetna Ins. Co. v. Humboldt, etc., Ry. Co., 3 Dill 2. *Contra,* People's Natural Gas Co. v. Fidelity, etc., Co., 150 Pa. St. 8; 24 Atl. Rep. 339; Insurance Co. of N. A. v. Fidelity, etc., Co., 123 Pa. St. 523; 16 Atl. Rep. 791; 2 L. R. A. 586.

[139] Badger v. Platts, 68 N. H. 222; 44 Atl. Rep. 296; Traders' Ins. Co. v. Race, 142 Ill. 338; 31 N. E. Rep. 392.

§ 819. Inhaling gas, accident or life insurance policy.

Clauses in accident or life insurance policies often provide that the company shall not be liable for injuries or deaths produced by inhaling gas. In such a case if the inhaling is done while asleep or unconscious, it is considered that such a clause is not violated, and a recovery is allowed.[140] In the case just cited the court declared that "in expressing its intention not to be liable for death from 'inhaling of gas,' the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense, and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which *ex vi termini* would be included, the dentist's work; or to a suicidal purpose."[141] Where a provision of an accident policy was that the company "does not insure against the death or disability . . . arising from anything accidentally taken, administered, inhaled, contact of poisonous substances, inhaling gas, or any surgical operation," it was held that the company was not relieved from liability for a death caused by inhaling illuminating gas which accidentally escaped into an hotel room where the insured was sleeping. "That provision in the policy," said the court, "clearly implies voluntary action on the part of the insured, or some other person. The insured must take or inhale, or another must administer. The manifest provision is to exempt the insurer from liability where the insured has voluntarily and consciously, but accidentally taken or inhaled, or something has been voluntarily administered which was injurious or destructive of life. We think that the particular accidents intended to be excepted by that provision are the accidental taking or inhaling into the system of some injurious or destructive agency under the mistaken belief that it was beneficial, or, at least, harmless. That is more apparent by that portion of the provision which relates

[140] Paul v. Travellers' Ins. Co., 112 N. Y. 472; 20 N. E. Rep. 347; affirming 45 Hun 313.

[141] Affirmed in principle in Bacon v. U. S., etc., Co., 123 N. Y. 304; 25 N. E. Rep. 399; 9 L. R. A. 617; reversing 3 N. Y. Supp. 237.

to something 'administered,' as it cannot be reasonably construed as referring to a thing involuntarily and unconsciously administered. Indeed, it is quite difficult to understand how a thing could be involuntarily and unconsciously administered. Coupled together as these provisions are, the same rule of construction must be applied to that portion which relates to something accidentally inhaled as applies to the portion which relates to a substance accidentally taken or accidentally administered. All cases thus provided for plainly involve voluntary and conscious action on the part of the insured, or some other person. The leading and controlling idea in this provision is the performance of a voluntary act which accidentally causes the death or injury of the insured. That a proper construction of the policy requires us to hold that it applies only to cases where something has been voluntarily and intentionally, although mistakenly taken, administered, or inhaled, there can, we think, be but little doubt. As thus construed, this provision, manifestly, did not exempt the defendant from liability in this case, as it was admitted that the death of the insured was occasioned by accidental means, and was caused by involuntary and accidentally breathing illuminating gas which had escaped into the room where he was sleeping at the time of his death. The argument that the provision as to inhaling gas has been given the same effect as is now given to the other and more general one, and that such could not have been their purpose, has little force. The inhaling of gas having been specifically provided for when taken for surgical and like purposes, it is only when it is inhaled for some other purpose, or under other circumstances, that the general provision applies. The special provision is applicable when gas is inhaled for surgical and like purposes. The general provision applies when it is inhaled for other purposes."[142] But where the policy provides that

[142] Menneilley v. Employers', etc., Corp., 148 N. Y. 596; 43 N. E. Rep. 54; 31 L. R. A. 686; affirming 25 N. Y. Supp. 230; Fidelity, etc., Co. v. Waterman, 161 Ill. 632; 44 N. E. Rep. 283; 32 L. R. A. 654, affirming 59 Ill. App. 297; Pickett v. Pacific, etc., Ins. Co., 144 Pa. St. 79; 22 Atl. Rep. 871; Travellers' Ins. Co. v. Dunlap, 160 Ill. 642; 43 N. E. Rep. 765, affirming 59 Ill. App. 515 (unknowingly taking pois-

the insurance company shall not be liable for a death caused by the "voluntary or involuntary inhalation of any gas," or "resulting from any poison or infection accidentally or otherwise taken, administered, absorbed, or inhaled," there can be no recovery if the death resulted from an unconscious inhalation of gas.[142a]

Death caused by inhaling gas in the atmosphere is regarded as death produced by a violent external agency within the meaning of a provision of a policy requiring the death to be caused by external and violent means.[143] And where the insurance company admitted that the death was caused by involuntary and accidental breathing of illuminating gas which had accidentally escaped into the deceased's room; that there were no visible marks of the accident upon the body, but when artificial respiration was produced, illuminating gas emanated therefrom to the perception of the persons producing such respiration; and that on entering the room it was perceived to be full of gas, and gas was still escaping, and that an inspection of the body showed life to be extinct, this was held to authorize a recovery on the policy.[144]

on); Healey v. Mutual, etc., Co., 133 Ill. 556; 25 N. E. Rep. 52 (unknowingly taking poison); Metropolitan, etc., Assn. v. Froiland, 161 Ill. 30; 43 N. E. Rep. 766, affirming 59 Ill. App. 522; Picket v. Pacific, etc., Ins. Co., 144 Pa. St. 79; 22 Atl. Rep. 871; Omberg v. U. S., etc., Association, 111 Ky. 303; 40 S. W. Rep. 909; Lowenstein v. Fidelity and Casualty Co., 88 Fed. Rep. 474; affirmed 97 Fed. Rep. 17; Healey v. Mutual, etc., Co., 133 Ill. 556; 25 N. E. Rep. 52. *Contra*, Richardson v. Ins. Co., 46 Fed. Rep. 843; and see Kasten v. Interstate, etc., Co., 99 Wis. 73; 74 N. W. Rep. 534; 40 L. R. A. 651.

[142a] Porter v. Preferred, etc., Ins. Co., 186 N. Y. 599; 79 N. E. Rep. 1114, affirming 109 N. Y. App. Div. 103; 95 N. Y. Supp. 682; Travelers' Ins. Co. v. Ayers, 217 Ill. 390; 79 N. E. Rep. 506; affirming 119 Ill. App. 402.

[143] Paul v. Travelers' Ins. Co., *supra;* United States, etc., Co. v. Newman, 84 Va. 52; 3 S. E. Rep. 805.

[144] Menneilley v. Employers', etc., Corp., *supra.*

CHAPTER XXXII.

TAXATION.

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§ 820. Scope of chapter.

Necessarily this chapter must be limited to those cases in which the subject of taxes, or rating, as it is called in England, is peculiar to gas companies, gas and oil leases, or interests in land, gas fixtures, pipes and works, and oil or gas when held in pipes, tanks and reservoirs. It is manifest at a glance that the power to impose taxes and the liability for them must depend upon statutes in force at the place of taxation; and that a decision construing one statute can afford little light in construing another.

§ 821. When corporate stock taxed, property of company exempt.

The value of stock of a corporation is determined by the value of property it represents. To tax both the stock and the property would be double taxation, a thing that it cannot be

supposed the legislature intended. Where, therefore, the stock of a gas company is taxed, the property it represents is not taxable, and usually the property is such property as is necessary to enable the corporation to execute the object and fulfill the purposes for which it was chartered.[1] Dwelling houses, however, that were not necessary for the performance of a company's proper work and which had been built for the accommodation of its workingmen, has been held liable to taxation.[2]

§ 822. Exempt as a manufacturing company.

Under a statute[3] exempting from taxation "manufacturing companies carrying on manufactures within" the State, an artificial gas company organized, even before the statute was enacted, is exempt from taxation; and so is a foreign gas corporation doing business within the State.[4]

§ 823. Gas mains of city plant taxed as personal property.

The general rule is that gas mains of a city plant, laid in the public streets do not become part of the real estate but are personal property, and taxable as such. They are personal property and belong to the gas company, and are a part of the usual and necessary appliances of such an establishment, without which the gas manufactured could not be received or delivered to the consumer.[5] On the contrary it has been held that reservoirs, hydrants and pipes of a water company are real and not personal property, and are taxable in the town in which they are situated.[6] In Iowa the entire plant is

[1] Coatsville Gas Co. v. County of Chester, 97 Pa. St. 476.

[2] West Chester Gas Co. v. County of Chester, 30 Pa. St. 232.

[3] N. Y. Act. 1880, Chap. 542, Sec. 3.

[4] Nassau, etc., Co. v. Brooklyn, 25 Hun 567. See also Pittsburg v. Consolidated Gas Co., 34 Pa. Super. Ct. 234.

[5] Memphis Gaslight Co. v. State, 6 Coldw. 310; 98 Am. Dec. 452; People, *ex rel.* Citizens', etc., Co. v. Assessors of Brooklyn, 6 N. Y. Trans. App. 116; Commonwealth v. Lowell Gaslight Co., 12 Allen 75; Covington Gaslight Co. v. City of Covington, 84 Ky. 94; Shelbyville Water Co. v. People, 140 Ill. 545; 30 N. E. Rep. 678; 16 L. R. A. 505; Kittanning v. Consolidated Natural Gas Co., 219 Pa. 250; 68 Atl. Rep. 728 (taxable by the borough in which laid); People v. Wells, 42 N. Y. Misc. Rep. 606; 87 N. Y. Supp. 595 (not taxable by the city wherein laid).

[6] Dover v. Main Water Co., 90 Me. 180; 38 Atl. Rep. 101; Consumers' Gas Co. v. Toronto, 27

assessed as a whole, including the pipes, in the city or township where the main works are located.[7] In England gas-pumpers, gas retorts, pumps and exhausters are taxed as fixtures, but meters are personal property.[8] In England where the tax is levied on the income after allowing certain deductions, where the gas works were situated in one township and the pipes extended into four other townships, it was held "that the ratable value of the mains and pipes, which would be the residue, after deducting the net ratable value of the stations, works, buildings and lands within the township where situated from the value of the whole ratable property of the company, must be apportioned among the different townships, not simply according to the extent of the mains contained in each, but keeping in view also the fact that part of them contributed directly, and part only indirectly, to the profits."[9] If the pipes are to be assessed

Can. S. C. 453; affirmed 23 Ont. App. Rep. 551. (This Canadian decision is controlled by a statute declaring that "land shall include all machinery or other things so fixed to any outbuilding as to form in law part of the realty." Consumers' Gas Co. v. Toronto, 26 Ontario Rep. 722.) Providence Gas Co. v. Thurber, 2 R. I. 15; Riverton, etc., Co. v. Haig, 58 N. J. L. 295; 33 Atl. Rep. 215; Paris v. Norway Water Co., 85 Me. 330; 27 Atl. Rep. 143 (taxable as real estate in the town where laid, although the company's works are situated in another town); People v. Martin, 48 Hun 193; Tidewater Pipe Line Co. v. Berry, 53 N. J. L. 212; 21 Atl. Rep. 490.

[7] Oskaloosa Water Co. v. Board, 84 Iowa 407; 51 N. W. Rep. 18.

As a rule a gas company cannot be assessed with any part of the cost of the improvement of the street wherein its pipes are laid. Spring Creek, etc., District v. Elgin, etc., Co., 249 Ill. 260; 94 N. E. 529.

After the common council has given a gas company permission to lay its pipes in a street, the city's improvement board cannot impose additional terms as a condition to the company's right to open the paved streets to lay a larger supply pipe. Pulaski Gaslight Co. v. Remmel (Ark.), 133 S. W. 1117.

An ordinance imposing an occupation tax bond on the gross earnings of a gas company, and not on an electric lighting company, is void, because the tax is not upon both companies. Lincoln Gas & El. Co. v. Lincoln, 182 Fed. 926.

[8] Regina v. Lee, L. R. 1 Q. B. 241; 35 L. J. M. C. 105; 12 Jur. (N. S.) 225; 13 L. T. (N. S.) 704; 14 W. R. 311.

[9] Michael and Will on Gas and Water (5 ed.), 53. See Regina v. Mile End Old Town, 10 Q. B. 208; 3 New Sess. Cas. 13; 16 L. J. M. C. 184; 11 Jur. 985; Regina v. West Middlesex Waterworks Co., 1 E. and E. 716; 28 L. J. M. C. 135; 5 Jur. (N. S.) 1159; Regina v. Sheffield Consolidated Gaslight Co., 32 L. J.

as real estate, the sale of the real estate of the company, other than the pipes, to pay the tax upon them, is erroneous.[10]

§ 824. Assessing franchise or gross receipts.

In New York a foreign gas company selling and distributing gas to consumers under authority from a municipality, natural gas furnished by another company, whose property consists of pipes and mains located beneath the surface of the street and reservoirs built on a lot, must be assessed on its property as real estate "at its full and true value";[11] and in determining the value of the franchise granted by the municipality, and the value of the contract with the company for supplying the city with gas, cannot be considered.[12] Where a statute imposed a

M. C. 169; 4 B. and S. 135; 9 Jur. (N. S.) 623; 8 L. T. (N. S.) 692; 11 W. R. 1064; Sculcoates Union v. Hull Dock Co. [1985], App. Cas. 137; 64 L. J. M. C. 49; 71 L. T. 642; 43 W. R. 623; 59 J. P. 612; 11 R. 74. See also Riverton, etc., Co. v. Haig, 58 N. J. L. 295; 23 Atl. Rep. 215, where the court refused to class the plant of a water company as a "farm" or "lot" so it could be assessed in one district. "The idea that they [the pipes] may be considered appurtenances to the place of supply and taxable there is untenable. There is no principle upon which it can rest." Paris v. Norway Water Co., *supra*. *Contra, In re* Des Moines Water Co., 48 Ia. 324; Fall River v. Bristol Co., 125 Mass. 567; Oskaloosa Water Co. v. Board, 84 Ia. 407; 51 N. W. Rep. 18; 15 L. R. A. 296; San Jose v. January, 57 Cal. 614; Fond Du Lac Water Co. v. Fond Du Lac, 82 Wis. 322; 52 N. W. Rep. 439; 16 L. R. A. 581; Yellow River, etc., Co. v. Wood County, 81 Wis. 554; 51 N. W. Rep. 1004.

[10] Capitol City Gaslight Co. v. Charter Oak Ins. Co., *supra*. See also Kittanning v. Consolidated Natural Gas Co., 26 Pa. Super. Ct. 355.

For a short discussion of gas and water pipes laid in a public street, see article by J. H. Beale in 4 Harvard Law Review 83.

[11] Laws 1881, Chap. 293. In this State a foreign company, engaged in transporting natural gas, which has acquired the privilege to do business therein, with the same right as a domestic company, by complying with the general corporation law, and by acquiring consent of the highway authorities to lay its pipes in the highway, acquires a special franchise, which is taxable as such. People v. Priest, 126 N. Y. Supp. 472.

[12] People v. Martin, 48 Hun 193.

The New York Laws of 1855, Chap. 37, assessing the property of a foreign corporation, has no application to such a case as is above stated, as that statute applies only to personalty. *Ibid.*

franchise tax on every railroad company, press dispatch, telephone, turnpike, palace car, sleeping car, and "every other like company" having or exercising any exclusive privilege to natural persons or for performing any public franchise, it was held to impose a franchise tax on a corporation manufacturing cottonseed oil and owning tank cars for shipping its products to its customers over railroads on a mileage basis.[12a] A statute laying a tax upon the "gross earnings" of a gas "company carrying on business entirely within the state," and defining the term "gross earnings" as arising from its operations, the term so used includes all incidentals, subordinate, and subsidiary operations, as well as the principle operations of supplying gas, as the sale of apples grown upon its land, and of the right to take ice from its pond, and the sale of coke, tar, and other residuary products, and the sale of gas for heating, cooking and lighting. It means the entire earnings from all operations, and not such earnings less operating expenses, taxes, and bad debts; for "gross earnings" are the entire earnings, without deductions for expenses incurred.[12b] A provision in a municipal franchise

Tax on franchise. Owensboro Waterworks Co. v. Owensboro (Ky.), 74 S. W. Rep. 685; 24 Ky. L. Rep. 2530, rehearing denied. 75 S. W. Rep. 268; 25 Ky. L. Rep. 434.

Tax on gross receipts. Paterson, etc., Co. v. State Board, 69 N. J. L. 116; 54 Atl. Rep. 246; Scranton v. Scranton, etc., Co., 33 Pa. Super. Ct. 431.

As a condition to the laying of its mains in the streets a city may require a gas company to pay an annual sum to it or a certain percentage on its gross receipts, and such a provision is not void on the ground that it imposes an additional tax on the gas company not authorized by law. Columbus v. Columbus Gas Co., 76 Ohio St. 309; 81 N. E. Rep. 44.

Tax on bonus given to gas company to locate its plant in a city. Parsons Nat. Gas Co. v. Rockhold, 79 Kan. 661; 100 Pac. Rep. 639.

The actual occupancy of a street in a city by a company for its mains constitutes an easement, and not a mere franchise, and is therefore taxable to the corporation as real estate. Consolidated Gas Co. v. Baltimore, 101 Md. 541; 61 Atl. Rep. 532; Stockton Gas & El. Co. v. San Joaquin County, 148 Cal. 313; 83 Pac. Rep. 54.

[12a] James v. Kentucky Refining Co., 132 Ky. 353; 113 S. W. Rep. 468.

[12b] State v. United, etc., Co., 90 Conn. 452; 97 Atl. 856.

given a gas company for the payment to the city of a percentage of the company's "gross receipts" is not a provision for the payment of a "tax," but merely a provision for the payment of a consideration for the privilege given it by the city.[12c] The Constitution of California[12d] imposes a gross earnings tax on gas and electric companies, and exempts them from all other taxes and licenses. It was held that this provision exempted them from liability to pay license fees required by a statute as a condition to the registration of motor vehicles and by such companies used exclusively in their business.[12e]

§ 825. Valuation of stock.—Certificates as to surplus.

The value of the physical property of a gas company does not necessarily determine the value of its stock; nor does the amount the stockholders would receive upon a dissolution of the corporation. The privileges, rights, patents and franchise of the company must also be considered in determining the value of the stock.[13] Certificates of a stockholder's interest in the surplus revenue of the company, reserving to the gas company the right to redeem them upon notice of their face value, or by the issue of ordinary stock, are not taxable, since such surplus is taxable to the company.[14]

[12c] Hanford Gas & Power Co. v. Hanford, 163 Cal. 108; 124 Pac. 727.

[12d] Art. 13, Sec. 14.

[12e] Pacific Oil & Gas Co. v. Roberts, 168 Cal. 420; 143 Pac. 700.

In Oregon an ordinance of the city of Portland in providing that gas companies should pay a "license" of three percent of their gross receipts was valid, it confessedly being a revenue measure, the imposition a "tax", however characterized. It was deemed a property tax on their franchise to be a corporation. Portland v. Portland Gas & Coke Co., 80 Ore. 194; 150 Pac. 273. But subsequently a contrary decision was rendered. Portland v. Portland Gas & Coke Co., 80 Ore. 194; 156 Pac. 1070.

A law permitting the taxation of the gross earnings of an oil company is constitutional. State v. Standard Oil Co., 32 Okl. 607; 123 Pac. 40.

[13] People *ex rel.* Buffalo, etc., Co. v. Steele, 56 N. Y. 664; 1 Sheldon 345.

[14] People *ex rel.* Williamsburg Gas Co. v. Assessors of Brooklyn, 76 N. Y. 202; 16 Hun 196.

§ 826. Exemption of municipalities from taxation.

The property of a municipality used in furnishing natural gas to it and its citizens is exempt from taxation under a statute exempting the property of a municipality from taxes.[15] But where the constitution of a State provided that "there shall be exempt from taxation public property used for public purposes," it was held that a city's water or gas plant may be taxed by the State, the same as it may tax any private corporation.[16] A statute exempting from taxation property of a city used by it in furnishing its citizens with gas or water does not apply to an independent company furnishing such inhabitants with gas or water.[17]

§ 827. Rates charged consumers not taxes.

Rates or rents established by a municipal corporation to be charged for the use of water furnished by it are not taxes which may be collected by the tax collector, even though the water works are operated at a profit.

§ 828. Cost of inspection of meters.

A statute creating the office of a gas meter inspector, and providing that his salary shall be paid by assessment upon the various gas companies of the State, is valid, and does not violate a constitutional provision providing that all taxes shall be assessed upon property by a uniform rule. Such an assessment is not a tax for general revenue. It is a charge for a special

[15] Toledo v. Hosler, 54 Ohio St. 418; 43 N. E. Rep. 583; 35 Ohio L. J. 215.

[16] Neeley v. City of Henderson (Ky.), 55 S. W. Rep. 554. See Commonwealth v. McKibbon, 90 Ky. 384; 14 S. W. Rep. 372; Covington v. Commonwealth, 19 Ky. L. Rep. 105; 39 S. W. Rep. 836; 173 U. S. 231; Newport v. Commonwealth, 21 Ky. L. Rep. 42; 50 S. W. Rep. 845; 51 S. W. Rep. 343; 45 L. R. A. 518. See also Wagner v. Rock Island, 146 Ill. 139; 34 N. E. Rep. 545; 21 L. R. A. 519.

[17] Austin v. Austin Gaslight Co., 69 Tex. 180; 7 S. W. Rep. 200; Newport Light Co. v. City of Newport, 14 Ky. L. Rep. 464; 20 S. W. Rep. 434.

purpose growing out of the supervisory power of the State over the gas companies' business.[18]

§ 829. Object of tax.— Ohio statute unconstitutional.

The constitution of Ohio contains a provision declaring that every statute imposing a tax shall state distinctly the object of such tax.[19] A statute of that State provided that in counties of a certain population moneys arising from the tax on oil wells should be returned to the township treasurer, not to exceed a specified amount, for the exclusive purpose of repairing highways. This statute was held to violate the provision of the constitution referred to, for the reason that the tax on the oil wells was raised for another specific purpose.[20]

§ 830. United States revenue.

An Internal Revenue Act of the United States [21] levied a tax upon gas, but allowed the manufacturer of it to add the tax to the cost charged the consumer. The City of Pittsburg surrendered to a gas company certain shares of stock it held in the company, in consideration of which the company agreed to furnish it with gas "free from charge." Under this agreement a large amount of gas was furnished on which the gas company paid the tax, and then brought suit to recover the amount from the city. But they were defeated, the court holding that the city was not liable.[22] This statute provided that the gas made by the manufacturer "for his own use" should not be taxable. While it was in force the Philadelphia gas works was held and operated by trustees, appointed by the city, under a trust agreement. While the city had apparently

[18] Cincinnati Gaslight Co. v. State, 18 Ohio St. 237. See Kittanning v. Kittanning, etc., Co., 26 Pa. Super. Ct. 355.

Under its general "welfare clause" a city cannot provide by ordinance that a water company shall be annually licensed and registered, and pay a certain sum to the city for police purposes. Wilkes-Barre v. Crystal Spring Water Co., 7 Kulp. (Pa.) 31.

[19] Ohio Const., Art. 12, Sec. 5.

[20] State v. Fangboner, 14 Ohio Cir. Ct. Rep. 104; 7 Ohio Dec. 334.

[21] 13 U. S. Stat. at L. 264, Sec. 94.

[22] Gas Company v. Pittsburg, 101 U. S. 219.

the ultimate ownership of the gas works under this agreement, until certain debts due from the city, contracted to build and enlarge the works, were paid, they were to be held and managed exclusively by these trustees, who were to sell gas to the city at a certain price, and set aside all clear profits to provide a sinking fund for the payment of the principal due the creditors. It was held that gas furnished the city under this agreement was "made" and sold within the meaning of the statute so as to render it liable to taxation.[23]

§ 831. Set off.

A city, when sued for the amount it owes a gas company for gas furnished it, cannot set off, when a statute provides that a set off "can only be pleaded in an action founded on contract, or ascertained by the decision of the court," against such amount the delinquent taxes due it from such company; for the reason that taxes "neither arise upon contract, either expressed or implied, nor is the amount thereof determinable by the judgment of a court."[24]

§ 832. Product in pipeline. Inter-state commerce.

A pipe line company transporting oil through its pipes from one State to another, may be taxed in the latter State for the privilege of doing business in that State; and the tax may be a certain percentage of the receipts from the transportation of the oil, such a tax not being an interference with inter-State commerce.[25]

[23] City of Philadelphia v. Collector, 5 Wall 720. See Glasgow Gas Comrs. v. Solicitor, at 3 Court of Sessions Rep. (4 Series) 857.

Tax on gross receipts under Sec. 27 of the War Revenue Act of June 1, 1898 (30 U. S. Stat. at L. 464; U. S. Comp. St. 1901, p. 23061), United States v. Northwestern Ohio Nat. Gas Co., 141 Fed. Rep. 198; United States v. Consumers' Gas Trust Co., 142 Fed. Rep. 134; 73 C. C. A. 352.

[24] Nebraska City v. Nebraska, etc., Co., 9 Neb. 339; 2 N. W. Rep. 870.

[25] State v. State Board, 57 N. J. L. 516; 31 Atl. Rep. 220; 27 L. R. A. 684. For analogous cases, see Maine v. Grand Trunk Ry., 142 U. S. 217; 12 Sup. Ct. Rep. 121, 163; G. C. T. Railroad Tax Cases, 92 U. S. 575; Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; Cleveland, etc., Co. v. Backus, 133 Ind. 513; 33 N. E. Rep. 421; 18 L. R. A. 729; affirmed 154 U. S. 439; 14 Sup. Ct. Rep. 1122.

§ 833. Exemption from taxation.

In Pennsylvania boilers, engines and derricks used for the transportation of oil and to aid in its production are exempt from taxation by statute.[26] And so of companies transporting natural gas to the public are exempt as to local taxes, being a public corporation.[27] Pipes of natural gas company laid in the streets are exempt in this State.[28] And the buildings of a gas company are also exempt from local taxation, if it pays taxes to the State.[29] In Ohio gas wells, pipe lines, pumping stations and machinery owned and used by a city for the conveyance of gas to be consumed by it and its citizens generally are exempt by statute[30] exempting all works, machinery, pipe lines and fixtures belonging to any town or city and used exclusively for testing and lighting such town or city.[31] In California inasmuch as the franchise of a gas company is assessed as a whole,[32] pipe lines running through a county to supply people of another county are not subject to local taxation, for the reason that such pipe line is not a franchise, being only a mere right of way.[33] Property not used for a public purpose, as a house for a tenant,

[26] Mellon v. Alleghany Co., 3 Pa. Dist. Ct. Rep. 422.

[27] St. Marys Gas Co. v. Elk Co., 191 Pa. St. 458; 43 Atl. Rep. 321; Ridgeway Light, etc., Co. v. Elk Co., 191 Pa. St. 465; 43 Atl. Rep. 323; Mellon v. Alleghany Co., 3 Pa. Dist. Rep. 422.

[28] Pittsburgh's Appeal, 123 Pa. St. 374; 16 Atl. Rep. 621; Cootsville Gas Co. v. West Chester Co., 97 Pa. St. 476.

[29] Schuylkill Co. v. Citizens' Gas Co., 148 Pa. St. 162; 23 Atl. Rep. 1055; West, etc., Co. v. Philadelphia, 3 Pa. Dist. Rep. 52; Spring Brook, etc., Co. v. Schadt. Co., 3 Lack L. News 170. (In this case it was held that the rule which measures the extent to which property used by a water company for the purpose of furnishing proper water to the public shall be exempted from local taxation will be liberally construed in favor of the company.) Brush Electric Light Co. v. Philadelphia, 8 Pa. Dist. Rep. 231; Pittsburg v. Consolidated Gas Co., 34 Pa. Super. Ct. 234.

The same rule prevails in New York as to taxing locally the value of the franchise. People v. Brooklyn Assessors, 19 N. Y. App. Div. 599; 46 N. Y. Supp. 388.

[30] Rev. Stat., Sec. 2732.

[31] Toledo v. Hosler, 54 Ohio St. 418; 35 Ohio L. J. 215; 43 N. E. Rep. 583.

[32] San Jose v. January, 57 Cal. 614.

[33] Spring Valley Waterworks Co., v. Barber, 99 Cal. 36; 33 Pac. Rep. 735; 21 L. R. A. 416.

is not exempt from taxation in Pennsylvania;[34] even houses of the workingmen of the company owned by it are not exempt.[35]

§ 834. Taxes on leases and minerals.

If there is no covenant on the part of the lessee to pay the taxes on the landowner's interest in the premises, he is not bound to do so,[36] unless same statute especially fixes that burden upon him.[37] The lessor pays the value of his own interest in the land; and the lessee the value of his interest in them under the lease, which includes the improvements he has put upon the land premises in the operation of them under the lease.[38] In no event can the land be assessed higher by reason of the two interests being owned by two persons than if they were owned by one of them.[39] When the entire premises is owned by one person the value of the mineral underneath the surface cannot be assessed separate and apart from the landowner's remaining interest in the land.[40] But the lease may provide that the lessee shall pay all the taxes assessed against the entire premises. Thus where a lease of coal land which created a divided ownership of the coal and surface provided that the lessor should pay all taxes on the leased land, it was held that the lessee was liable for the taxes assessed upon the lands while in possession and exploring them, though no ore was found and the lease was subsequently declared forfeited.[41] A covenant by the lessee to pay taxes does not cover a local municipal assess-

[34] Schuylkill County v. Citizens' Gas Co., 148 Pa. St. 162; 23 Atl. Rep. 1055.

[35] West Chester Gas Co. v. Chester Co., 30 Pa. St. 232; Ridgeway Light and Heat Co. v. Elk Co., *supra*.

[36] Sanderson v. City of Scranton, 105 Pa. St. 469; Delaware, etc., Co. v. Sanderson, 109 Pa. St. 583.

[37] Chevington & Bum Co. v. Lewis, 10 W. N. C. (Pa.) 196.

[38] Hecksher v. Sheafer, 17 W. N. C. (Pa.) 323; Hale, etc., Co. v. Storey County, 1 Nev. 105; Flory v. Heller, 1 Monaghan (Pa.) 478; Miles v. Delaware, etc., Co., 140 Pa. St. 623; 21 Atl. Rep. 427; Woodward v. Delaware, etc., Co., 121 Pa. St. 344; 15 Atl. Rep. 622; State v. Moore, 12 Cal. 56; People v. Bell, 237 Ill. 332; 86 N. E. Rep. 593.

[39] Logan v. Washington Co., 29 Pa. St. 373; City of Scranton v. Gilbert, 16 W. N. C. (Pa.) 28.

[40] City of Scranton v. Gilbert, 16 W. N. C. (Pa.) 28; Kiser v. McLean, 67 W. Va. 294; 67 S. E. Rep. 725; Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., 83 Kan. 136; 109 Pac. Rep. 1002.

[41] Gribbens v. Atkinson, 64 Mich. 351; 31 N. W. Rep. 570.

ment to defray the cost of sewer, or the payment for the cost of grading a street.[42] Where a party was seized of what is called in Pennsylvania unseated land subject to a mineral reservation of oil and mineral rights, it was held that there was no such a personal obligation of the owner to pay taxes as rendered him liable to the owners of the oil or mineral rights for taxes paid by him to prevent a sale, there being no such a community of interest between them as implied a promise to pay.[43] After mineral has been severed from the soil it becomes the personal property of the lessee, and is taxable to him.[44] Where a statute provided that the person in possession of real estate, whether he held its fee simple or as a life estate, should be deemed the owner for the purpose of taxation, it was held that a conveyance by the owners of land of the oil and gas to a third person, upon condition that the grantee pay a certain amount of money to the grantors within a specified time after the completion of the well on the land, and providing that if the money was not paid within that time the grant should be void, that the right thus given was taxable to the grantee as real estate.[45] In such an instance an assessment of the lessee's or grantee's interest as personal property is void.[46] But where a statute provides for the taxation of mineral in place the same as land, oil and gas in the ground cannot be taxed to the person who has acquired the right to drill for them for a certain time, and who is to pay a specified amount of them as royalty.[47] A tax law providing that the words personal property shall include all fixtures attached to land, not included in the valuation of such land as entered upon the proper tax duplicate, all appliances used in producing oil, such as pump, tanks, boilers, are taxable as

[42] Pettibone v. Smith, 150 Pa. St. 118; 24 Atl. Rep. 693; Delaware, etc., Co. v. Von Storch, 196 Pa. St. 102; 46 Atl. Rep. 375.

[43] Neill v. Lacy, 110 Pa. St. 294; 1 Atl. Rep. 325; Powell v. Lantzy, 173 Pa. St. 543; 34 Atl. Rep. 450.

[44] Forbes v. Gracey, 94 U. S. 762. In Pennsylvania it has been held that a lessee's estate is not assessable as land conveyed to a grantee; but where the lessee is in fact the grantee of an interest in the coal, oil or gas underlying a tract, he takes an estate in the land that is assessable as such. Moore's Appeal, 4 Pa. Dist. Rep. 703.

[45] State v. Low, 46 W. Va. 451; 33 S. E. Rep. 271. See Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140; 99 Pac. Rep. 483.

[46] Carter v. County Court, 45 W. Va. 806; 32 S. E. Rep. 216; 43 L. R. A. 725.

[47] Jones v. Wood, 2 Ohio Dec. 75; 9 Ohio Cir. Rep. 560; 6 Ohio Cir. Dec. 538, reversing 1 Ohio N. P. 155; Moore's Appeal, 4 Pa. Dist. Rep. 703.

producing oil, such as pump, tanks, boilers, are taxable as personal property.[48] Coal in place belonging to one not owning the surface under which it lies may be assessed as land apart from the surface.[49] And the word "held" in a statute providing that when coal or gas privileges are "held by a party or parties, company or association, exclusive of the surface, the same shall be assessed separately to such" party or association,[50] must be construed as "owned," and such privileges or interest cannot be assessed to a mere lessee.[51]

§ 835. License or inspection tax.

An ordinance imposed on gas companies a license tax of one hundred dollars per month. The city's charter provided that in imposing such taxes no discrimination should be made between persons engaged in the same business otherwise than by proportioning the tax upon any business to the amount of business done. This ordinance was held valid, though the burden fell much more heavily on a small than on a large company, the charter not forbidding the imposition of a uniform license tax upon all engaging in a particular calling; and it was not necessary to take into consideration the several earnings of the companies. Such a license tax is the exercise of the taxing, and not the police power; and hence the rule that fees or penalties exacted for permits issued under police reg-

[48] Carter v. County Court, *supra*.

A mining lease required the lessees to pay taxes on the improvements which were not to be removed until full royalty had been paid, the lessors being given a first lien on all such improvements and machinery to secure the royalty, and further provided that the lessee might remove the building, machinery, etc., subject to the conditions of the lease. It was held that such machinery, buildings, etc., were not fixtures, and that the only interest of the lessors therein was a lien for unpaid royalty. Cherokee Const. Co. v. Bishop, 86 Ark. 489; 112 S. W. 189.

[49] Consolidated Coal Co. v. Baker, 135 Ill. 545; 26 N. E. Rep. 651.

[50] Acts v. W. Va., 1891, Chap. 36, Sec. 4.

[51] United States Coal, etc., Co. v. Randolph County Court, 38 W. Va. 201; 18 S. E. Rep. 566; Kiser v. McLean, 67 W. Va. 294; 67 S. E. Rep. 725; Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., 83 Kan. 136; 109 Pac. Rep. 1002.

Oil and gas leases on such Indian lands are not subject to taxation. Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522; 36 Sup. Ct. 453; *In re* Illuminating Oil Co. (Okl.), 142 Pac. 997.

ulations must bear some reasonable proportion to the expenses of regulating the business is inapplicable. A tax of that amount upon a company having only one hundred thousand dollars worth of property and an income of fifteen hundred dollars per month is not invalid as prohibitory or unduly oppressive.[52] Where a statute required property to be assessed at its fair cash value and to be taxed in proportion to that value, it was held that a tax of ten dollars on oil depots where petroleum or oils were stored in bulk or tank, was invalid if the subject of the license was construed to be the oil depot or building, but construed a police regulation it was valid.[53] And a fee of five dollars per year imposed upon the owner of oil selling it from a tank or wagon to retail dealers for resale was held legal.[54] In fixing the amount of the license fees there must be uniformity; greater burdens must not be laid upon one person than is laid upon other persons in the same calling or condition; the tax imposed must be the same on all those in the same business. If a municipality is laying the tax, it must not discriminate between residents and non-residents, unless especially authorized so to do by statute.[55] An ordinance which imposes one license tax upon corporations transporting oil to the state in bulk, in tank cars, or through pipes for the purpose of distributing it in the city, and imposes a much smaller tax upon persons who sell oil which has been transported to the city for distribution in barrels only, is void, because its discrimination between corporations and persons engaged in the same business, and because it is not uniform. But an ordinance which imposes a license tax on any person selling oil to merchants in the city, yet provides that it shall only apply to a person or corporation producing or manufacturing the oil which it sells, or to a person

[52] Los Angeles v. Los Angeles Independent Gas Co., 155 Cal. 140; 93 Pac. Rep. 1006.

[53] Standard Oil Co. v. Commonwealth, 119 Ky. 75; 82 S. W. Rep. 557. 1020; 26 Ky. L. Rep. 985.

[54] Standard Oil Co. v. Commonwealth, 119 Ky. 1; 82 S. W. Rep. 557; 26 Ky. L. Rep. 1187, affirming 82 S. W. Rep. 970; 26 Ky. L. Rep. 927.

[55] Standard Oil Co. v. Fredericksburg, 105 Va. 82; 52 S. E. Rep. 817; Norfolk, etc., N. Co. v. Norfolk, 105 Va. 139; 52 S. E. Rep. 851; Southwestern Oil Co. v. Texas, 217 U. S. 114; 30 Sup. Ct. Rep. 496; 54 L. Ed. —; affirming 100 Tex. 647; 103 S. W. Rep. 489.

or corporation who stores oil in stationary tanks and transports the same by tank wagons or in barrels through the streets of the city for the purpose of distribution or delivery to purchasers, is reasonable in its *classification* of the persons and corporations taxable thereunder, and does not violate the constitutional requirements of uniformity and against discrimination.[56] If a municipality be empowered to provide by ordinance for police supervision and inspection by its officers and servants of pipes laid under its streets by gas companies, it may, as a part of an incident to such provision, ordain the payment by them of a reasonable license fee or tax. Such a power is sustained and governed by the same general principles as its power to enact similar ordinances relative to the police supervision and inspection of poles and wires of telegraph, telephone and electric light companies; and the fact that the wires are maintained upon the surface of the streets and the pipes laid underneath the surface does not prevent the application of these principles.[57] In an application to enforce such a tax the municipality is not bound to prove the amount of the tax is reasonable; for the burden is on the gas company to prove it is unreasonable; and the court will not say it is a revenue measure under the guise of a police regulation, or that the license fee is grossly in excess of what is necessary to cover the reasonably to be anticipated expenses of proper police supervision, unless it is able to say from the facts of which it may take judicial cognizance, or from the undisputed or admitted facts, or, if there be a conflict of evidence, then from the duly ascertained facts, that such is the fact.[58] The facts that the pipes and mains are part of the gas company's natural system where it runs through a municipality, that they are necessary to carry out its corporate purposes, that they are included in its capital stock and are

[56] Standard Oil Co. v. Fredericksburg, 105 Va. 82; 52 S. E. Rep. 817.

In this case it was held that an oil company engaged in the business of refining and distributing oil and selling it to local dealers from tank wagons, and not from a fixed place of business, is *not a merchant* as that term is generally understood, and cannot, by voluntarily paying a state license as a merchant, prevent the assessment of a specific tax against its business.

[57] Kittanning v. Kittanning, etc., Gas Co., 26 Pa. Super. Ct. 355.

[58] Kittanning v. Kittanning, etc., Gas Co., 26 Pa. Super. Ct. 355.

taxed by the State will not render it immune from liability for a license fee imposed by the municipality. Imposing the license fee is not double taxation, although the fee is paid into the municipal treasury, and used indiscriminately with money derived from other sources.[59] The license fee can be made large enough to cover any reasonably anticipated expense; and its payment cannot be avoided because it may subsequently appear that it was somewhat in excess of the actual expense of supervision.[60]

§ 836. Unjust discrimination.

When there are several public service corporations engaged in furnishing heat, light, and power to the people of a city and occupying the streets, alleys, and public places of the city, with their apparatus for that purpose under franchise granted by the city, the fact that one furnishes heat, light, and power by electric current conveyed by wires and the other by gas conveyed by underground mains does not furnish a sufficient basis for classification to justify levying an occupation tax upon one of such companies and not upon the other. A tax so levied is void for unjust discrimination.[61]

[59] Kittanning v. Garretts Run Gas Co., 35 Pa. Super. Ct. 167.

[60] Kittanning v. Armstrong Water Co., 35 Pa. Super. Ct. 174. In this case the license tax was $30 a mile on six miles of pipe.

Where a statute imposed two per cent. on the gross actual receipts of a gas company exercising municipal franchises, and a company was formed by the consolidation of eight companies, only some of which were exercising municipal franchises, it was held that the consolidated company was liable to a tax of two per cent. of its gross and actual receipts earned as a consolidated company. Paterson, etc., Co. v. State Board, 70 N. J. L. 825; 59 Atl. Rep. 1118; affirming 69 N. J. L. 116; 54 Atl. Rep. 246.

[61] Lincoln v. Lincoln Gas & Electric Light Co., 100 Neb. 182; 158 N. W. Rep. 962.

An ordinance providing for a license tax on certain public service companies was held valid where it exempted manufacturers of acetylene gas delivered in tanks and owners of gas wells producing less than $50 worth of gas a month. Los Angeles Gas & El. Co. v. Los Angeles, 163 Cal. 621; 126 Pac. 594.

§ 837. Rents and royalties.

Rents and royalties which accrued on mining leases are not taxable as "credits."[62]

§ 838. Liability under federal corporation tax provision.

A gas company which has leased its plant for a term of years, the business being carried on by its lessee, is not "doing business" within the meaning of that statute, and is not liable to a federal tax.[63]

§ 839. Uniformity of license fees.

While a license fee must be imposed upon all gas companies alike—there must be uniformity in that respect—yet a gas company cannot complain of an ordinance imposing a license fee upon a gas company on the ground that it destroyed uniformity of taxation provided for by the State Constitution, merely because it happened there was only one gas company doing business in the city, even though it did not have an exclusive franchise.[64]

[62] State v. Royal Mineral Ass'n, 132 Minn. 232; 155 N. W. 128.

[63] Public Service Ry. Co. v. Herold, 227 Fed. 500; Waterbury Gaslight Co. v. Walsh, 228 Fed. 54; State Line & S. R. Co. v. Davis, 228 Fed. 246.

[64] Ex parte Holman (Mo.), 191 S. W. 1109.

CHAPTER XXXIII.

MISCELLANEOUS

§ 840. Artificial gas statutes do not relate to natural gas.
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§ 840. Artificial gas statutes do not relate to natural gas.

Statutes relating to the manufacture and supply of gas enacted before natural gas was discovered in this country, as a rule, do not apply to natural gas companies. In New York it has been held that a statute enacted in 1890, authorizing the formation of corporations for manufacturing and supplying gas for lighting streets and for buildings, and providing a penalty if they refused to supply gas to consumers on application, did not apply to natural gas companies incorporated under the "business corporations law" of 1875.*[1] And a contract between a city and an artificial gas company, giving it an exclusive franchise throughout the city, does not prevent the city from granting a natural gas company the right to fur-

*[1] Wilson v. Tennent, 65 N. Y. Supp. 852; affirmed 61 App. Div. 100; 70 N. Y. St. Rep. 2; affirmed 179 N. Y. 546; 71 N. E. Rep. 1142.

A corporation organized under the general corporation law of New Jersey cannot conduct business as a gas company. Richards v. Dover (N. J. L.), 39 Atl. Rep. 705.

Under Laws 1890, Ch. 566, Art. 6, Sec. 60, of New York, a company may be organized to supply both gas and electricity; and under Laws 1892, Ch. 688, Sec. 32, a gas company may enlarge its powers so as to manufacture and supply electricity. People v. Rice, 33 N. E. Rep. 846; 138 N. Y. 151.

nish light.[1a] A company organized to furnish natural gas cannot, after the supply of natural gas is exhausted, supply artificial gas.[1b] So a charter granted to a city at a time when natural gas was not known in the State, cannot be construed to give it the power to drill or purchase gas wells at a distance, and to construct or purchase pumping stations and pipe lines to bring the natural gas within its limits for consumption and sale to its inhabitants.[1c] But where a certain section of a statute empowered a city to regulate from time to time the price of electric and gas lighting; and another section provided that after the council had fixed the minimum price at which it would require a company to furnish "gas" or electric light for a period not exceeding ten years, it should not be lawful for the council to require the company to furnish gas at a less price during such period; and the first section was afterwards amended so as not only to be applicable to the fixing of the price of electricity, but also of "natural and artificial gas," it was held that the word "gas" as used in the second section was broad enough to embrace both artificial and natural gas, though at the time it was enacted the use of natural gas was unknown.[1d] And under this statute an ordinance requiring "any gas company" to furnish annual reports stating the cost of gas manufactured during the year, the number of feet manufactured, total expenses and receipts during the year, and similar information, it was held that the phrase "any gas company" applied to natural gas companies.[1e] So a statute authorizing the formation of corporations for the manufacture and supply of gas or the supply of light or heat to the public by any other means, is broad enough to authorize the creation of corporations to supply natural gas to the public.[1f]

§ 841. Larceny of gas.

To take artificial gas from a gas company with a felonious intent is larceny, even though the taker take it on his own

[1a] Circleville L. & P. Co. v. Buckeye Gas Co., 69 Ohio St. 259; 69 N. E. Rep. 436.

[1b] Consumers' Gas Trust Co. v. Quimby, 137 Fed. Rep. 882.

[1c] Quimby v. Consumers' Gas Trust Co., 140 Fed. Rep. 362.

[1d] Chillicothe v. Logan Natural Gas & Fuel Co., 8 Ohio N. P. 88; 11 Ohio S. & C. P. Dec. 24.

[1e] Cline v. Springfield, 7 Ohio N. P. 626; 10 Ohio S. & C. P. Dec. 389.

[1f] Compton v. People's Gas Co., 75 Kan. 572; 89 Pac. Rep. 1039; 10 L. R. A. (N. S.) 787.

In Canada an artificial gas company cannot supply natural gas. Harmer v. Brantford Gas Co., 13 Ont. W. Rep. 873.

land by secretly opening the gas company's service pipe laid therein for the purpose of supplying his house with gas. Thus to insert a pipe in the service pipe through which the gas flows to the burner direct and not through the meter, with the felonious intent to take it, and not pay for the same, is a larceny, there being a sufficient severance of the gas at the point of junction of the connecting pipe with the entrance pipe to constitute an asportation. It is immaterial whether the service pipe is the property of the taker or of the company.[2] If the pipe be kept full all the time, although the gas is repeatedly cut off at the point of consumption, there is a continuous taking, and not a series of separate takings; and there will be a continuous taking, even though the pipe has not been kept full, for it is usually substantially all one transaction.[3]

§ 842. "Shut off gas," meaning.

The printed regulations of a gas company provided that "the person sent to attend [to examine for leaking gas] is authorized to shut off the gas." In an action for personal injuries brought against a gas company, caused by an explosion of leaking gas, it was held that the gas company could show by parol evidence

[2] Regina v. White, 20 E. L. and Eq. 585; 17 Jur. 536; 3 Car. and K. 363; 6 Cox Cr. Cas. 213; Dears. C. C. 203; 22 L. J. (N. S.) 123; Beale's Cas. 506; Commonwealth v. Shaw, 4 Allen 308; 81 Am. Dec. 706; Beale's Cas. 506; Regina v. Mitchell, 22 Gas J. 137; Regina v. Jenkins, 5 Gas J. 214; State v. Wellman, 34 Minn. 221. See also Phœnix Gaslight, etc., Co. v. Shillits, 19 Gas J. 848; Commonwealth v. Dingman, 26 Pa. Super. Ct. 615 (theft of oil from an oil pipe).

[3] Queen v. Firth, L. R. 1 Crown Cas. Res. 172; People v. Wilber, 4 Park. Cr. Rep. 19.

So far as the writer knows, there are no decisions concerning the larceny of natural gas; but inasmuch as natural gas confined in pipes is subject to private ownership, there is no reason why the felonious taking of it from the pipe should not be a larceny, even a taking from the pipe in the well should be so considered. But a taking from the earth, by drilling a well would be a mere trespass. For larceny of water see, see Ferens v. O'Brien, 11 Q. B. Div. 21; 15 Cox. C. C. 332.

As to such a concealment of a fraudulent taking of gas as will prevent the Statute of Limitations running, see Imperial Gaslight and Coke Co. v. London Gaslight and Coke Co., 10 Exch. 39; 26 Eng. L. and Eq. 425; 3 Gas J. 483.

that the direction to "shut off the gas" applied, in this connection, only to shutting off gas from houses and not from streets.[4]

§ 843. Contract for purchase of oil.

A refiner of oil, who purchases of a dealer, at current prices, all the crude oil he may need during a particular year, he agreeing to order more than a certain amount per month, does not prohibit him from ordering, at any time during the year, subject to the monthly limitations, such an amount of oil as he may need, for the entire year. He is bound to withhold his orders until he actually needs the oil; and if the vendor refuses to fill such orders, to the extent of the amount of oil proved to be needed, he is liable.[5] A contract for the sale and purchase of from 60,000 to 108,000 barrels of oil, to be delivered as ordered by the buyer, provided that not less than 5,000 nor more than 9,000 barrels shall be delivered in any month, requires the buyer to take a minimum of 5,000 barrels each month, and the buyer, ordering the maximum quantity during certain months, is not relieved from the necessity of purchasing the minimum quantity in succeeding months.[5a]

[4] Bartlett v. Boston Gaslight Co., 117 Mass. 533.

Under a statute declaring it unlawful for any person to turn off any valve belonging to any person furnishing gas to consumers without permission of the owner, the doing of the act, without consent, is unlawful, without any reference to the intent of the doer. State v. Moore, 27 Ind. App. 83; 60 N. E. Rep. 955. In this case the lessee was taking off gas from the leased premises in violation of the terms of the case; and it was held that the lessor could not shut off the gas, but, to secure relief, must resort to his legal remedy.

[5] Willock v. Crescent Oil Co., 184 Pa. St. 245; 28 Pittsb. L. J. (N. S.) 351; 39 Atl. Rep. 77.

[5a] Central Oil Co. v. Southern Refining Co., 154 Cal. 165; 97 Pac. Rep. 177. See also Los Angeles G. & El. Co. v. Amalgamated Oil Co. (Cal.), 106 Pac. Rep. 55.

Such a contract is an agreement to sell and deliver in the future, and is authorized by a statute providing that any property which, if in existence, may be the subject of sale, may be the subject of an agreement of sale whether in existence or not, and is not void under a statute declaring that the subject of sale must be property, the title to which can be immediately transferred. Central Oil Co. v. Southern Refining Co., *supra*.

§ 844. Term "fire proof oil" as a trademark.

The term "Fire Proof Oil" cannot be claimed successfully as a trademark for an illuminating oil. The reason is that such words are descriptive of oil, which is not inflammable, although it is not literally proof against fires.[6]

§ 845. Gas company's liability for supplies.

A corporation organized to manufacture and supply illuminating and heating gas may purchase the right to use and deal in steam-heaters, radiating mantels, and gas consuming appliances, if such purchases are advantageous to its business as a manufacturer and distributor of gas.[7] If it purchase gas pipes, to be of good material and workmanship, and they are defective and with flaws so gas escapes, and it lay such pipes in the soil without knowledge of the defects and flaws, it may recover damages from the vendor, or recoup them when sued for the price of the pipes, which will cover the cost of taking out the pipes to replace them with others, including the relaying of new pipes.[8]

§ 846. Gas not a necessary of life.

Where a husband left his wife, and she continued to use gas in the house as usual, it was held that he was not liable for the gas thus used.[9]

§ 847. Bankruptcy of oil company.

A gas company, which makes, transports through pipes, and sells to special customers, within a limited area, is not principally engaged in either manufacturing, trading, or mercantile pursuits, within the meaning of the Bankruptcy Act of July 1, 1898. Such is the case of a gas company having a franchise to maintain pipes in the streets of a municipality

[6] Scott v. Standard Oil Co., 106 Ala. 475; 19 So. Rep. 71; 31 L. R. A. 374.

The term "Prest-O-Lite" cannot be registered under the New York laws as a trade mark. Prest-O-Lite Co. v. Ray, 220 N. Y. 522; 116 N. E. 350.

[7] Malone v. Lancaster, etc., Co., 182 Pa. St. 309; 40 W. N. C. 434; 14 Lanc. L. Rev. 321; 15 Nat. Corp. Rep. 98; 37 Atl. Rep. 932.

[8] Smith v. Citizens', etc., Co., 5 W. N. C. 97.

[9] Kettening Gas Co. v. Leach, 24 Gas J. 503.

or contract for lighting its streets, which manufactures gas and transmits and sells it to its customers. The same is true of a company which has such a contract for the furnishing of electricity.[10] The word "manufacturing" as applied to corporations in that act embraces only such corporations as are engaged in manufacturing as a business and selling their wares on the market, doing those things usually done by those who not only manufacture their wares and goods, but place them on the market for sale, either by wholesale or retail.[11]

§ 848. Stock in gas companies.

A State legislature has the right to authorize a State commission to prohibit the issue of stock and bonds until it has approved of the issue as being within the reasonable requirements of the company.[12] By a New York statute it was provided that no corporation should issue stocks or bonds except for money paid and labor done, or property actually received for lawful corporate purposes; and that it might increase or reduce its capital stock in the manner therein provided, but not beyond any maximum or minimum prescribed by the general law. A statute relating to gas companies provided that stocks and bonds should not be issued by a gas company until the State commission certified that they were reasonably required for corporate purposes. A gas company purchased its plant, and thereafter made large expenditures in enlarging and removing its plant to another location, and, a part of the old plant was necessarily dismantled and rendered useless in changing the location. It was held that the company was bound to give the public reasonable service, and, if the growth of its business required increased facilities and there was a fair prospect of enlarging its business, it was not required to continue the use of the old plant, and could issue stock and bonds necessary to erect a new plant commensurate with its needs, even though a part of such indebtedness resulted from dismantling the old plant. In this instance, when the gas company purchased its plant, there was an indebtedness on

[10] *In re* Hudson River Electric Power, 173 Fed. Rep. 934.

[11] Walker Roofing & Heating Co. v. Merchant & Evans, 173 Fed. Rep. 771.

[12] *In re* Watertown Gaslight Co. (N. Y.), 111 N. Y. Supp. 486.

it of fifty thousand dollars, which was afterwards paid from the surplus earnings of the company, no dividends having been paid in order to pay off this indebtedness. It was held that as the surplus earnings belonged to the stockholders, from which they had a right to receive dividends, they having discharged the corporate indebtedness with such earnings, they were then entitled to issue new stock of the company for the debts so paid.[13] In New Jersey a statute authorized gas companies to issue stock for property purchased to the amount of the value of the property so received, and it was held that the value received by the company should be equal to the amount of the stock issued for it, and that a court of equity would entertain a proceeding by the state to set aside an issue of a gas company of stock for property purchased in excess of the value of the property.[14]

§ 849. Sale of adulterated cooking oil.

A manufacturer or dealer who sells adulterated or poisonous cooking oil to a retail merchant is liable to his vendee for loss of business in selling the oil to his customers. A company advertising itself as a manufacturer and seller of pure looking oil, is deemed to have knowledge of its properties, and it must be so held. The sale of adulterated cooking oil by a wholesale dealer even is *prima facie* evidence of negligence, though the package was properly labeled cottonseed oil. But where the plaintiff, a retail merchant purchased adulterated oil from the defendant, a wholesaler, it was held that the duty resting on the plaintiff concerning the sale of the oil was substantially the same as that on the defendant, and if, by reason of his opportunity to examine the oil, the plaintiff had cause

[13] *In re* Watertown Gas Co. (N. Y.), 111 N. Y. Supp. 486. In this case it appeared that when the present owners purchased the plant of the gas company, the company had a capital stock of $100,000; the present owners paid $187,500 for the stock, or $87,500 over its par value; but it did not appear what surplus, if any, the company then had or what dividends it had paid prior to the purchase. It was held that the fact that the stock sold for a premium of $87,500 did not, under the circumstances, justify the capitalization of that sum or the issue of new stock or bonds against it.

[14] McCarter v. Pitman, etc., Gas Co., 74 N. J. Eq. 235; 69 Atl. Rep. 211.

As to power to increase its bonded indebtedness, see Thatcher v. Consumers' Gas & Fuel Co., 72 N. J. Eq. 825; 66 Atl. Rep. 934.

to believe it was not a pure article of food, then he would be guilty of bringing about the loss of trade resulting from the sale of the oil, for which he sought to recover from the defendant, and the latter would not be liable.[15]

§ 850. One gas company purchasing gas of another company.

Where two gas companies were authorized to make an agreement by which the older company was to purchase gas from the new company, which it was able to do at a saving of over twenty thousand dollars a year, and the new gas company did not sell gas to consumers, and was willing to supply the old company with all the gas necessary during the existence of the old company's franchise, it was held that the contract was not objectionable as operating to stunt the business and prospects of the old company, and build up that of the new company to the detriment of the old one.[16] Where negotiations leading up to a contract of a natural gas company to sell its gas to another company were known to the directors, and the other company made large expenditures to convey the gas to its mains and secured rights of way, and both companies had treated the agreement as valid, it was held that the natural gas company was estopped to allege that the contract was invalid, because it had not been approved at a directors' meeting when a quorum was present.[17]

§ 851. Dissolution of company.—Stock extinguished.

Where a business corporation was organized to mine and sell natural gas to the residents of a city, the fact that the stock subscription contracts required repayment of amounts paid by subscribers, with interest and that after such payment the corporation should reduce the price of gas to consumers to cost, without further dividends to shareholders, and that the entire capital stock was under the voting power and control of five trustees, selected from the stockholders, did not deprive the latter of their character and rights as such on

[15] Neiman v. Clannellene Oil Mfg. Co., 112 Minn. 11; 127 N. W. Rep. 394.

[16] Theis v. Spokane Falls Gaslight Co., 49 Wash. 477; 95 Pac. Rep. 1074.

[17] Greensboro Gas Co. v. Home Oil & Gas Co., 222 Pa. 4; 70 Atl. Rep. 940.

payment of their subscriptions, with interest, and hence, on the termination of the corporation's business by the supply of natural gas becoming exhausted, they were entitled to have the corporation dissolved and its assets distributed to them.[18]

§ 852. Cost of pumping well.

A lessee in an oil lease agreed to pay one-half of the cost of pumping oil, but if not satisfied with the charge the lessor himself could assume the pumping. It was held that the lessor was liable for one-half the actual cost reasonably incurred in pumping, though he might possibly have secured some one else who would have done the work for less money.[19]

§ 853. Trust.—Suppression of competitor.

The Standard Oil Company of Indiana and the Waters-Pierce Company by agreement divided the State into two districts, apportioning one district to each, agreeing not to sell in each other's territory. The Indiana company was both a dealer and manufacturer of the products of petroleum, and in its capacity as a manufacturer agreed not to sell to any other dealer, except the Waters-Pierce Company, in its territory; it agreeing in return not to purchase from any other refiner, and both agreeing not to sell to any other dealer, except at retail prices. Shortly thereafter the Standard Oil Company of New Jersey which controlled both the Indiana and the Waters-Pierce Companies, took over their largest and sharpest competitor in Missouri, after which no competition existed between the Indiana Company and the Waters-Pierce Company. It was held that such agreement constituted an illegal combination in restraint of trade.[20] A statute which prohibits combination and agreements to fix and maintain prices and limit trade, is violated by an agreement to give rebates to customers which in effect is in restraint of trade to fix prices of a commodity; and it makes no difference between luxuries and necessities.[21]

[18] Consumers' Gas Trust Co. v. Quimby, 137 Fed. Rep. 882. See also Quimby v. Consumers' Gas Trust Co., 140 Fed. Rep. 362.

[19] Far West Oil Co. v. Witmer Bros., 143 Cal. 306; 77 Pac. Rep. 61.

[20] State v. Standard Oil Co., 218 Mo. 1; 116 S. W. Rep. 902.

[21] State v. Standard Oil Co., 218 Mo. 1; 116 S. W. Rep. 902.

§ 854. Damages for destruction of oil wells.

The measure of damage in an action of tort for destroying a prospect hole for oil or gas by lack of ordinary care is ordinarily the value of the hole fixed at an amount necessary to bringing it to the point where the destruction occurred; but under the statute of Oklahoma there may be recovery of treble the amount necessary to bring the hole to the point where the destruction occurred.[22]

[22] North Healdton Oil & Gas Co. (Okl.), 158 Pac. 1180.

LESSOR'S AND LESSEE'S REMEDIES.

CHAPTER XXXIV.

LESSOR'S REMEDY.

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§ 855. Want of consideration.

If a landowner execute a lease for which there is no consideration, and he decides to avoid it, he should promptly declare a forfeiture in some way so as to inform the lessee of his declaration; and if the lessee thereafter attempt to operate upon the leased premises he may be enjoined, and in the same action the bill may contain a prayer that the lease be cancelled as a cloud upon the lessor's title.[1]

§ 856. Failure to explore premises.

If the lessee abandon the object for which the lease was granted,—as where he fails to explore for gas or oil, as the lease grants him permission to do, the lessor may bring an action to cancel the lease, as a cloud upon his title.[2] Such is an instance where the lessee has entered on the premises and drilled one or more unproductive wells, and then abandons the lease by ceasing for an unreasonable time to explore the premises or operate the wells. In such an instance equity will cancel the lease.[3] And the fact that the lessee has erected residences and conveniences upon and is cultivating part of the demised premises will not prevent the lessor recovering possession of all the premises not actually necessary for producing and marketing oil.[4] But equity will not cancel a lease before the expiration of the term for mere delay in

[1] § 76. Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 933; Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. 830; Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. 933; Crawford v. Ritchie, 43 W. Va. 252; 27 S. E. 220; Bettman v. Harness, 42 W. Va. 433; 26 S. E. 271; 36 L. R. A. 566; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107.

[2] §§ 156, 206. Huggins v. Daley, 99 Fed. 606; 44 C. C. A. 12; 48 L. R. A. 320; Crawford v. Ritchie, 43 W. Va. 252; 37 S. E. 220; New American Oil Co. v. Troyer, 166 Ind. 402; 76 N. E. 253; Carney v. Barnes, 56 W. Va. 581; 49 S. E. 423; Starn v. Huffman, 62 W. Va. 422; 59 S. E. 179; Betten v. Hope Natural Gas Co., 71 W. Va. 481; 76 S. E. 889; Paraffine Oil Co. v. Cruce, 112 Pac. 716.

[3] § 160. Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. 655; 59 L. R. A. 566; Lowther Oil Co. v. Miller-Sibley Co. 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107; Rawlings v. Armel, 70 Kan. 778; 79 Pac. 683; Munroe v. Armstrong, 96 Pa. 307; Florence Oil Co. v. Orman, 19 Colo. App. 79; 73 Pac. 628; Venture Oil Co. v. Fretts, 152 Pa. 451; 25 Atl. 732; Brewster v. Lanyon Zinc Co., 140 Fed. 801; 72 C. C. A. 213.

paying rent or commutation money, and failure to commence operations at the time stipulated, if it appears that the lessee is ready and willing to pay the rent and perform the covenant to open and operate the land.[5]

§ 857. Failure of lessee to begin operations.

A failure of the lessee to begin operations within the time specifically specified in the lease, or if no time be actually specified, within a reasonable time after its execution, then the lessor may bring an action to cancel the lease as a cloud upon his title. Of course, the remedy is in equity, unless a code provide a statutory remedy.[6] If the lease is for a definite or stated term, but is qualified by the words "and as much longer as oil or gas is produced in paying quantities," and oil or gas has been produced by the lessee on the premises, then whether or not it is being produced in "paying quantities" is a question of fact; but the lessee is the judge as to what amount of oil or gas constitutes "paying quantities" if he exercise his judgment in good faith.[7] Thus in

[4]Fowler v. Delaplain, 79 Ohio 279; 87 N. E. 261.

[5] Pheasant v. Hanna 63 W. Va. 613; 60 S. E. 618.

[6] § 216. Western Pennsylvania Gas Co. v. George, 161 Pa. 47; 28 Atl. 1004; Rudde v. Mellon, 147 Pa. 30; 23 Atl. 241; Bettman v. Harness, 42 W. Va. 433; 26 S. E. 271; 36 L. R. A. 566; Hazelgreen Oil Co. v. Collins (Ky.), 110 S. W. 343; 33 Ky. L. Rep. 661; Thomas v. Hukill, 34 Va. 385; 12 S. E. 522; Murdock-West Co. v. Logan, 69 Ohio St. 514; 69 N. E. 984; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 620; Northwestern Ohio Nat. Gas Co. v. Tiffin, 59 Ohio St. 420; 54 N. E. 77; Central Ohio Fuel Co. v. Eckert, 70 Ohio 127; 71 N. E. 281; Huggins v. Daley, 99 Fed. 606; 40 C. C. A. 12; 48 L. R. A. 320; Brewster v. Lanyon Zinc Co., 140 Fed. 801; 72 C. C. A. 213; Cheney v. Ohio, etc., Gas Co., 32 Ind. App. 193; 69 N. E. 477; American Window Glass Co. v. Williams, 30 Ind. App. 68; 66 N. E. 912; Lowther Oil Co. v. Miller-Sibley Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Eaton v. Allegheny Gas Co., 122 N. Y. 416; 25 N. E. 981; Cassell v. Crothers, 193 Pa. 359; 44 Atl. 446; Brown v. Fowler, 65 Ohio 507; 63 N. E. 76.

[7] § 148. Lowther Oil Co. v. Miller-Sibley Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Young v. Forest Oil Co., 194 Pa. 243; 45 Atl. 1021; Summerville v. Apollo Gas Co., 207 Pa. 334; 56 Atl. 876; McGraw Oil, etc., Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027; Double v. Union Heat, etc., Co., 172 Pa. 388; 33 Atl. 694; Murdock-West Co. v. Logan, 69 Ohio St. 514; 69 N. E. 984; Cassell v. Crothers, 193 Pa. 359; 44 Atl. 446; Bay State

one case it was said: "And whether or not oil is found in paying quantities is, furthermore, to be determined exclusively by the operator, acting in good faith and upon his honest judgment. We do not mean an arbitrary judgment, or one springing from an ulterior purpose to get some unfair or dishonest advantage of the landowner, but a judgment arrived at by acting in good faith upon sound business principles. But, as in other cases, fraud will not be presumed, and becomes provable only under proper averments. Therefore, under the pleadings and proof of this case, it was error in the court to submit to the jury the question whether oil was found in paying quantities. Any quantity would pay the landowner, for it would have cost him nothing. Under such a contract it is he who puts up the stake, and has to reckon with profit and loss, that shall decide, and not he who takes no risk, but receives a chance to be enriched at the expense and enterprise of another." When there is not a fair profit to the lessee over the actual expenses incident to the question of the leased premises, the lessor may show, by proper allegations in the pleading in a case for the cancellation of the lease, that oil or gas is not being produced in paying quantities, and that there is not a fair profit to the lessee in their production. Inasmuch as the lessee is in possession and operating the leased premises, the burden is on the lessor to show that he, himself, is producing oil or gas in paying quantities.[9]

§ 858. Reservation for Farming Purposes.

The lessee has only possession of the leased lands for mining purposes, and is only entitled to possession of so much

Petroleum Co. v. Penn. Lubricating Co., 27 Ky. L. Rep. 1133; 87 S. W. 1102; 121 Ky. 637; Barnsdall v. Boley, 119 Fed. 191; Dickey v. Coffeyville, etc., Co., 69 Kan. 106; 76 Pa. 398.

[8] § 149. Manhattan Oil Co. v. Carroll, 164 Ind. 526; 73 N. E. 1084, quoting from Young v. Forest Oil Co., 194 Pa. 243; 45 Atl. 121; Colgan v. Forest Oil Co., 194 Pa. 234; 45 Atl. 119; 75 Am. St. 695; Ammons v. South Penn. Oil Co., 47 W. Va. 610; 35 S. E. 1004; McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027; Dickey v. Coffeyville, etc., Co., 69 Kan. 106; 76 Pac. 398.

[9] § 151. Barnsdall v. Boley, 119 Fed. 191; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 435; 97 Am. St. 1027; Young v. Forest Oil Co., 194 Pa. 243; 45 Atl. 121.

of the surface as will enable him to develop the leased premises. If he, therefore, occupy more land thus leased than is reasonably necessary for that purpose, as for cultivation or residence or conveniences for his employees, the lessor may recover possession of so much of the premises as is not actually necessary for mining and producing purposes.[10]

§ 859. Removal of fixtures.

Where the lessee has placed fixtures upon the leased premises he must remove them during the term, or at least within a reasonable time thereafter. If he do not, they become the property of the lessor, and he may enjoin their removal, or if severed from the freehold and then removed without his consent, he may replevin them or recover their value in an action for damages. This is true where the lessee expressly reserves the right to remove them.[11]

§ 860. Cutting off supply of gas.

If the lessee has agreed to furnish the lessor gas from the wells developed, an injunction will lie to restrain him from cutting it off after the supplying has commenced, upon showing that great injury would result from cutting off the gas and there is no adequate remedy at law.[12]

§ 861. Reservation around buildings.

A reservation by the lessor of lands around his buildings is a retention of the right to occupy the space there reserved to the entire exclusion of the lessee as much so as if he was an entire stranger to the lease. The lessee may exhaust oil or gas thereunder, if he can do so by the sinking of wells upon that part of the leased premises next to the land reserved, but not otherwise.[13] If the lessee invade these premises the

[10] Fowler v. Delaplain, 79 Ohio St. 279; 87 N. E. 261.

[11] § 217. Shellar v. Shivers, 171 Pa. 569; 33 Atl. 95.

[12] Simpson v. Pittsburg Plate Glass Co., 28 Ind. App. 343; 62 N. E. 753.

[13] Allison's Appeal, 77 Pa. 221; Westmoreland, etc., Gas Co. v. DeWitt, 130 Pa. 235; 18 Atl. 724; Brown v. Spillman, 155 U. S. 665; 15 Sup. Ct. 245; Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 392; 68 N. E. 1020;

lessor has the same remedy against him as if the lease had never been granted him or as he would have against any stranger.

§ 862. Rentals for Gas Developed.

Gas developed by the lessee does not in whole or in part belong to the lessor; so much of it as the lessee has secured in the well or pipes is his, the lessee's. But the lease usually provides that if the gas is discovered in paying quantities the lessee shall pay as a consideration therefor an annual cash rental for each well; and also usually further provides that the lessee shall pay this rental when the gas is sold on and off the premises. Upon discovering gas in paying quantities the lessee becomes liable for the rental, even though he does not use it off the premises; for he cannot take advantage of his own neglect.[14] If the lease be a mere license before gas is discovered, upon developing the gas the lessee's interest in the premises becomes a vested one, but he cannot shut the well in, claim a vested right, hold the lease, and refuse to pay gas rental. If he does the lessor may declare a forfeiture of the lease and bring an action in equity to cancel it.[15] But the lessor, regardless whether the lease before the discovery of gas is a license or not, may recover the rental under the terms of the lease, even though the lessee has not marketed it, in an action of assumpsit.[16] Yet, if a lease be so construed as a grant of the oil and gas in place to the lessee, with a stipulation that gas only be found the lessee shall pay a fixed sum annually for such well while the gas from it is used off the premises, the lessor cannot recover of the lessee the stipulated rental covering the period during which the lessee might have

Lynch v. Burford, 201 Pa. 52; 50 Atl. 228; Duffield v. Rosenzweig, 150 Pa. 543; 24 Atl. 705; Duffield v. Rosenzweig, 144 Pa. 520; 23 Atl. 4; Duffield v. Hue, 136 Pa. 602; 20 Atl. 526.

[14] § 266. Summerville v. Apollo Gas Co., 207 Pa. 334; 56 Atl. 876.

[15] Gadberry v. Ohio, etc., Nat. Gas Co., 162 Ind. 9; 57 N. E. 259; Iams v. Carnegie Nat. Gas Co., 194 Pa. 72; 45 Atl. 54; McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027; Eastern Oil Co. v. Coulehan, 65 W. Va. 531; 64 S. E. 836; Summerville v. Apollo Gas Co., 207 Pa. 334; 56 Atl. 876.

[16] Iams v. Carnegie Nat. Gas Co., 194 Pa. 72; 45 Atl. 54; Indianapolis Nat. Gas Co. v. Wilhelm, 44 Ind. App. 100; 86 N. E. 86.

marketed the gas, even if he could have marketed it without financial loss upon its development in paying quantities.[17] If a lease does not expressly provide for a forfeiture for non-payment of gas rental, the lessor cannot declare a forfeiture for its non-payment. His remedy is an action to recover the rentals.[18] If the lessee has drilled one well on the leased premises thereby developing gas, the lessor cannot maintain an action to recover damages because the lessee has not further developed the premises; for the drilling of a second or other wells upon the leased premises might reduce the pressure of the gas in the well already developed to such an extent as to destroy it. In this respect the rule is different in the case of oil wells.[19] If the lessee has developed gas, but he cannot find a market for it, then he may hold the premises by paying the lessor the gas rental beyond the term named in the lease. In such an instance the lessor cannot secure a cancellation of the lease, either upon the ground of abandonment or for failure to further develop the leased premises.[20] If the lessee at his option, by the payment of an annual rental, may delay developments from year to year, before he can declare a forfeiture the lessor must give the lessee notice of his intention so to do. This notice must specify a time when a forfeiture will be declared sufficiently far ahead to enable the lessee, with reasonable diligence, to develop the premises if he desires. If he do not develop the premises within the time thus fixed, the lessor may then declare a forfeiture and bring an action to cancel the lease, or in states where a statutory right of action is given in such instances, for possession.[21]

[17] § 266. Ohio Oil Co. v. Lane, 59 Ohio St. 307; 52 N. E. 791.

[18] Davis v. Chautauqua Oil & Gas Co., 78 Kan. 97; 96 Pac. 47.

[19] McKnight v. Manufacturers' Nat. Gas Co., 146 Pa. 185; 23 Atl. 164.

[20] McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027; Summerville v. Apollo Gas Co., 207 Pa. 334; 56 Atl. 876.

[21] Consumers' Gas Trust Co. v. Littler, 162 Ind. 320; 70 N. E. 363; Indiana Nat. Gas & Oil Co. v. Lear, 34 Ind. App. 61; 72 N. E. 283; Consumers' Gas Trust Co. v. Ink, 163 Ind. 174; 71 N. E. 477; Consumers' Gas Trust Co. v. Worth, 163 Ind. 141; 71 N. E. 489; Consumers' Gas Trust Co. v. Chrystal Window Glass Co., 163 Ind. 190; 70 N. E. 366.

§ 863. Lessor's option where there be forfeiture and rental clauses in lease.

If the lease specify a definite term, a rental period, and contain a clause empowering the lessor to terminate the lease for failure to develop the premises or pay the rent stipulated for delay when payable, a failure on the lessee's part to explore or pay the rent within the period and at the time provided authorizes the lessor to declare a forfeiture. When such a declaration is made the lease is at an end.[22] But the lessor may waive the forfeiture and bring an action to recover the rental for the time the lessee held the exclusive right to operate; and the lessee cannot set up as a defense that the lease has been forfeited.[23] After a declaration of forfeiture the lessee is not liable for rentals that would otherwise have accrued after that date. If the lessor accept rental for a period after that date he thereby waives his declaration of forfeiture and continues the lease in force for the period for which the rent was paid.[24] If there has been actual forfeiture, although no actual declaration to that effect has been made by the lessor, yet he may lease the premises to a second lessee who will acquire rights superior to those of the first lessee; for the execution of the second lease is a declaration in law of

[22] §§ 141, 175. Brown v. Vandergrift, 80 Pa. 142; Logansport, etc., Gas Co. v. Null, 36 Ind. App. 503; 76 N. E. 125; Munroe v. Armstrong, 96 Pa. 307; Galey v. Kellerman, 123 Pa. 491; 16 Atl. 474; Paxton Oil Co. v. Myers, 39 Ind. App. 695; 80 N. E. 851; Wolf v. Guffey, 161 Pa. 276; 28 Atl. 1117; Kennedy v. Crawford, 138 Pa. 561; 21 Atl. 19.

[23] § 271. Conger v. National Transportation Co., 165 Pa. 561; 30 Atl. 1038; Ray v. West, etc., Gas Co., 138 Pa. 576; 20 Atl. 1065; Gibson v. Oliver, 158 Pa. 277; 27 Atl. 961; Springer v. Citizens' Nat. Gas Co., 145 Pa. 430; 22 Atl. 986; McMillan v. Philadelphia Co., 159 Pa. 142; 28 Atl. 220; Wills v. Manufacturers' Nat. Gas Co., 130 Pa. 222; 18 Atl. 731; New Dominion Oil & Gas Co. v. Gaffney Oil Co., 134 Ky. 792; 121 S. W. 699; Galey v. Kellerman, 123 Pa. 491; 16 Atl. 474; Roberts v. Bettman, 45 W. Va. 143; 30 S. E. 95; Hancock v. Diamond Plate Glass Co., 162 Ind. 146; 70 N. E. 149; Cochran v. Pew, 159 Pa. 184; 28 Atl. 219; Scott v. Lafayette Gas Co., 42 Ind. App. 614; 86 N. E. 495; Liggitt v. Shira, 159 Pa. 350; 28 Atl. 218; Matthews v. People's Nat. Gas Co., 179 Pa. 165; 36 Atl. 216; Jones v. West Penna. Nat. Gas Co., 146 Pa. 204; 23 Atl. 386; Phillips v. Vandergrift, 146 Pa. 357; 23 Atl. 347; Ogden v. Hatry, 145 Pa. 640; 23 Atl. 324; Jackson v. O'Hara, 183 Pa. 233; 38 Atl. 624.

[24] §§ 183, 184. Wolf v. Guffey, 161 Pa. 276; 28 Atl. 1117.

a forfeiture of the first lease.[25] To work a forfeiture of the first lease by the execution of a second, the execution must be a clear and unequivocal declaration by the landowner of the forfeiture. The right to declare a forfeiture must have existed at the time of the execution of the second lease.[26] If the lessee has incurred a forfeiture or has abandoned the premises, and the lessee executes a second lease, providing in it or in a contemporaneous writing, that the lease is made subject to the first one, the effect is to incorporate into the contract the fact that he had advised the second lessee that the land had been theretofore leased, and that he was to take his lease subject to the first one with the understanding that if the latter was valid he should take nothing by the contract, but if invalid the second lease should then stand as a binding contract between them.[27] A statement in the lease that if the premises be not developed or the rental paid on time that it should become "null and void" is not strengthened by a clause that it shall thereafter "be of no effect between the parties" or "can only be removed by mutual consent," for these are merely cumulative phrases with the same meaning, and the lessor may declare a forfeiture or collect the rentals subject to the right of surrender, if reserved.[28] Delay on the part of the lessor to enforce or declare a forfeiture when one has occurred may amount to a waiver of the right to enforce it, as where the lessee is permitted to expend a considerable amount of money in developing the leased premises after the right to declare a forfeiture has accrued without any warning

[25] Guffey v. Hukill, 34 W. Va. 49; 11 S. E. 754; 8 L. R. A. 759; Wolf v. Guffey, 161 Pa. 276; 28 Atl. 1117; Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 923.

[26] § 183. Schaupp v. Hukill, 34 W. Va. 375; 12 S. E. 501; Bartley v. Phillips, 179 Pa. 175; 36 Atl. 217; Hukill v. Myers, 36 W. Va. 639; 15 S. E. 151; Bartley v. Phillips, 165 Pa. 325; 30 Atl. 842; Lowther Oil Co. v. Guffey, 52 W. Va. 88; 43 S. E. 101; Stone v. Marshall Oil Co., 188 Pa. 602; 41 Atl. 748, 1119; Henne v. South Penn. Oil Co., 52 W. Va. 192; 43 S. E. 147.

[27] § 93. Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. 839; Stone v. Marshall Oil Co., 188 Pa. 602; 41 Atl. 748, 1119; Foster v. Elk Fork Oil & Gas Co., 90 Fed. 178; 32 C. C. A. 560; Eaton v. Allegheny Gas Co., 122 N. Y. 416; 25 N. E. 981.

[28] § 175. Jones v. Western Penna. Nat. Gas Co., 146 Pa. 204; 23 Atl. 386; Phillips v. Vandergrift, 146 Pa. 357; 23 Atl. 347; Ogden v. Hatry, 145 Pa. 640; 23 Atl. 334.

from the lessor that he has forfeited his rights. Usually the lessor must act promptly. If the lessor consent that the rent need not be paid when due, and indulges or acquiesces in his failure to pay on time, there is no forfeiture or a waiver of the right to declare it. Before a forfeiture can, in such an instance, be declared, a demand for payment must be first made, and a reasonable time given for development.[29] The drilling of a dry hole will not enable the lessor to declare a forfeiture, unless the lessee abandons the premises or fails to make further explorations within reasonable time after drilling such dry hole.[30] If the contract between the so-called lessor and the so-called lessee is nothing more than an option, not binding the lessee to perform any obligation therein, then the former may terminate it at any time before the latter has done any act by which he binds himself to exercise his option. The lessor may notify the lessee of his election to revoke the lease, or he may execute a new lease to another person, and such notice or new lease will be a revocation of the contract or old lease, unless the first lessee has performed some act binding himself to exercise his option. So the death of the lessor, during the time the lease or contract remains executory is a complete revocation of it.[31] If there has been such delay as to work a forfeiture of the lease, or it has been abandoned, a court of equity has jurisdiction to enter a decree cancelling the lease.[32]

[29] § 183. Hukill v. Myers, 36 W. Va. 639; 15 S. E. 151; Puritan Oil Co. v. Myers, 39 Ind. App. 695; 80 N. E. 851; Hancock v. Diamond Plate Glass Co., 162 Ind. 146; 70 N. E. 149; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 762; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320; 70 N. E. 363; Campbell v. Rock Oil Co., 151 Fed. 191; 80 C. C. A. 467. See Guffey v. Smith, 237 U. S. 101; 35 Sup. Ct. 526; 59 L. Ed. 856, reversing 202 Fed. 106; 120 C. C. A. 436.

[30] Aye v. Philadelphia Co., 193 Pa. 451; 44 Atl. 655; 74 Am. St. 696; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107; Florence Oil, etc., Co. v. Orman, 19 Colo. App. 79; 73 Pac. 628.

[31] § 76. Cortelyou v. Barnsdall, 236 Ill. 138; 86 N. E. 200; Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. 933; Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 293; Federal Oil Co. v. Western Oil Co., 112 Fed. 674; 57 C. C. A. 428; Martel v. Jennings-Heywood Oil Syndicate, 114 La. 903; 38 So. 253; Waterford Oil & Gas Co. v. Shipman, 233 Ill. 9; 84 N. E. 53; 122 Am. St. —.

[32] § 212. Smith v. Root, 66 W. Va. 633; 66 S. E. 1005; 30 L. R. A. (N. S.) 176; Tennessee Oil, etc., Co. v. Brown, 65 C. C. A. 524; 131 Fed. 696; McIntosh v. Robb, 4 Cal. App. 484; 88 Pac.

§ 864. Lessee's option to permit a forfeiture or pay rent.

If the lease provide that the lessee may pay the lessor rent or commutation money, and contains no express covenant binding him either to explore or pay the rent, yet provides that unless he make explorations within a certain time, or pay rental for delay, in the absence of fraud the lessor cannot refuse payment and declare a forfeiture at the expiration of such specified time, and thus terminate the lease. But if the lessee fail to pay the rental for delay he may declare a forfeiture and thus terminate the lease.[33] But if the lessee unreasonably delays explorations and the delay may result in irreparable loss to the lessor by drainage of his premises of its oil or gas, or may prevent him from obtaining development of his property contemporaneously with development in the vicinity, he may notify the lessee of his desire to have the property explored, and upon such lessee's failure for an unreasonable time, or his refusal to do so, he may refuse to accept payment of rentals for further delay, declare a forfeiture and obtain a cancellation of the lease.[34]

§ 865. Surrender clause in lease.

If no consideration be paid for a lease, and a clause in it provides for its surrender at any time without payment of rent or the fulfillment of any of its covenants by the lessee, it is no more than a right to enter at will on the part of the lessee, and the lessor may terminate it at any time before the

517; Mills v. Hartz, 77 Kan. 218; 94 Pac. 142; Murray v. Graham, 117 La. 1023; 42 So. 489; Logansport, etc., Gas Co. v. Seegar, 165 Ind. 1; 74 N. E. 500; Florence Oil, etc., Co. v. McCumber, 38 Colo. 366; 88 Pac. 265.

[33] § 78. Smith v. South Penn. Oil Co., 59 W. Va. 204; 53 S. E. 152; Jennings-Heywood Oil Syndicate v. Housierre-Lattreille Oil Co., 119 La. 864; 44 So. 481; Van Etten v. Kelly, 66 Ohio St. 605; 64 N. E. 560; Great Western Oil Co. v. Carpenter, 43 Tex. Civ. App. 229; 95 S. W. 57; Snodgrass v. South Penn. Oil Co., 47 W. Va. 509; 35 S. E. 820; Glasgow v. Chartier Oil Co., 152 Pa. 48; 25 Atl. 232.

[34] Lowther Oil Co. v. Guffey, 52 W. Va. 88; 43 S. E. 101; Consumers' Gas Trust Co. v. Worth, 163 Ind. 141; 71 N. E. 489; Dill v. Fraze, 165 Ind. 53; 75 N. E. 971; Consumers' Gas Trust Co. v. Chrystal Window Glass Co., 163 Ind. 190; 71 N. E. 489; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320; 70 N. E. 363.

If the lease is for five years, upon prompt payment of annual rentals, there can be no declaration of forfeiture, in case of failure to develop, until after the five year period. Shaffer v. Marks, 241 Fed. 139.

rent be paid or the obligation of the lease be performed; and the execution of a second lease, the sale of the property, or the death of the lessor will terminate it.[35] But if the lease contains an express covenant to pay the rent for delay in drilling, and also contains a clause authorizing the lessee to surrender the lease at any time and be relieved of all obligations thereafter accruing, the lessor may recover from the lessee all rentals accrued at the time of actual surrender of the lease.[36] If the lease has been part of public record, then the lessor is entitled to have the surrender of the lease properly executed and recorded by the lessee. If the lease has not been recorded, the lessor is entitled to its actual surrender by the lessee.[37]

§ 866. Liability of assignee.

An assignee is liable to the lessor for damages occasioned during the time he holds title to the leased premises under his assignment;[38] and the lessor may recover for breaches of the covenants in the lease from each successive assignee, but each assignee is only liable for the breaches which occurred during the time he held title to the lease.[38*] The burden is on the lessor to prove the assignment.[39] During the time he holds title to the lease the assignee is liable for the rentals to the lessor.[40]

[35] § 70. Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 293; Roberts v. McFadden, 32 Tex. Civ. App. 47; 74 S. W. 105; Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. 933.

[36] § 273. Roberts v. Bettman, 45 W. Va. 143; 30 S. E. 95; Ward v. Tripple State, etc., Co., 131 Ky. 711; 115 S. W. 819; Bettman v. Shadle, 22 Ind. App. 542; 53 N. E. 662.

[37] Ward v. Tripple State Nat. Gas & Oil Co., 131 Ky. 711; 115 S. W. 819.

[38] §§ 230, 233. Fennel v. Guffey, 139 Pa. 341; 20 Atl. 1048; Dailey v. Heller, 41 Ind. App. 379; 81 N. E. 219; Indiana Nat. Gas, etc., Co. v. Hinton, 159 Ind. 398; 64 N. E. 224; Washington Nat. Gas Co. v. Johnson, 123 Pa. 576; 16 Atl. 799; Bradford Oil Co. v. Blair, 113 Pa. 83; 4 Atl. 218.

[38*] § 231. Washington Nat. Gas Co. v. Johnson, 123 Pa. 576; 16 Atl. 799.

[39] Heller v. Dailey, 28 Ind. App. 555; 63 N. E. 490.

[40] Washington Nat. Gas Co. v. Johnson, 123 Pa. 576; 16 Atl. 799; Jackson v. O'Hara, 183 Pa. 233; 38 Atl. 624; Burton v. Forest Oil Co., 204 Pa. 349; 54 Atl. 266; Breckenridge v. Parrott, 15 Ind. App. 417; 44 N. E. 66; Woodland Oil Co. v. Crawford, 55 Ohio St. 161; 44 N. E. 1093; 34 L. R. A. 62.

§ 867. Breach of implied covenants.

In an instance of a breach of implied covenants the remedy of the lessor is by a declaration of forfeiture and a suit in equity to cancel the lease. Such an instance is where the lease contains an express covenant for the payment of rental commutation money as indemnity for delay in development, but contains no clause providing for a forfeiture of the lease for failure to pay the rental or commutation money, or for failure to develop the premises. In such an instance the lessee cannot refuse to make the explorations and hold the lease for speculative purposes, but must develop them within a reasonable time, or pay the rental or commutation money.[41] This cancellation is placed upon the grounds of abandonment. And if the lessee develop the premises by finding gas in paying quantities, and then close up the well and refuse to market it and pay gas rental or rental for the right to develop the land, and the delay is for an unreasonable time, the lease will be cancelled by a court of equity on the ground of abandonment.[42] Even though the lessee has the right under the lease to delay development of the premises, yet, if there be wells on adjoining territory producing oil or gas in such close proximity as to produce a drainage of the premises, the lessor may, after demand and notice to the lessee of his intention so to do, refuse to accept the rent and apply to a court of equity for relief by specific performance or cancellation of the lease, and relief will be given in the alternative; and in extreme cases it will appoint a receiver to protect the premises by making the necessary developments.[43] If the necessity for

[41] Guffey v. Hukill, 34 W. Va. 49; 11 S. E. 567; Allegheny Oil Co. v. Snyder, 106 Fed. 764; 45 C. C. A. 604; Bluestone Coal Co. v. Bell, 38 W. Va. 297; 18 S. E. 493; Federal Oil Co. v. Western Oil Co., 112 Fed. 373; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; Huggins v. Daley, 99 Fed. 606; 40 C. C. A. 12; Allegheny Oil Co. v. Snyder, 106 Fed. 764; 45 C. C. A. 60; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. 655; Venture Oil Co. v. Fretts, 152 Pa. 451; 25 Atl. 732; Smith v. Root, 66 W. Va. 633; 66 S. E. 1005.

[42] § 175. Eastern Oil Co. v. Conlehan, 65 W. Va. 531; 64 S. E. 836; Gadberry v. Ohio, etc., Gas Co., 162 Ind. 9; 67 N. E. 257.

[43] Sult v. Hochstetter Oil Co., 63 W. Va. 317; 61 S. E. 307; Consumers' Gas Trust Co. v. Worth, 163 Ind. 141; 71 N. E. 489; Consumers' Gas Trust Co. v. Chrystal Window Glass Co., 163 Ind. 190;

the protection of the premises exist by their development, or by further development, and their necessity is shown by clear proof, this right of the lessor to have further development or protection of his lines not depending upon mere difference of opinion between him and the lessee, or upon expert evidence as to the necessity for protection or the development of the land, a court of equity will assume jurisdiction to enforce specifically the implied covenants of the lease for such development and protection of the lines, and will decree a cancellation of the lease, unless within a given time the lessee further develops or protects the lines, as the case may be.[44] In the states of Ohio,[45] Illinois,[46] Kansas,[47]

70 N. E. 306; Indiana Nat. Gas Co. v. Leer, 34 Ind. App. 61; 72 N. E. 283; Elk Fork Oil & Gas Co. v. Foster, 99 Fed. 495; 39 C. C. A. 615.

[44] Kleppner v. Lemon, 176 Pa. 502; 35 Atl. 109; Coffinberry v. Sun Oil Co., 68 Ohio St. 488; 67 N. E. 1069; Kleppner v. Lemon, 197 Pa. 430; 47 Atl. 353; Monaghan v. Mount, 36 Ind. App. 188; 74 N. E. 579; Kleppner v. Lemon, 198 Pa. 581; 48 Atl. 483; Jones v. Mount, 166 Ind. 570; 77 N. E. 1089; Acme Oil Co. v. Williams, 140 Cal. 681; 74 Pac. 396; Buffalo Valley, etc., Co. v. Jones, 75 Kan. 18; 88 Pac. 537; J. M. Guffey Petroleum Co. v. Oliver (Tex.), 79 S. W. 884; Powers v. Bridgeport Oil Co., 238 Ill. 397; 87 N. E. 381; Brewster v. Lanyon Zinc Co., 140 Fed. 801; 72 C. C. A. 213.

This rule, however, is no longer followed in Pennsylvania, where it is now held that the lessor must allege and prove that the lessee was fraudulently evading the implied covenants of his lease. Colgan v. Forest Oil Co., 194 Pa. 234; 45 Atl. 119; 75 Amer. St. 695; Young v. Forest Oil Co., 194 Pa. 243; 45 Atl. 121; and the same rule has been adopted in West Virginia. Ammons v. South Penn. Oil Co., 47 W. Va. 610; 35 S. E. 1004, and Harness v. Eastern Oil Co., 49 W. Va. 232; 38 S. E. 662, though the Supreme Court of that State has expressed dissatisfaction with it. McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027.

The case of Kleppner v. Lemon, 176 Pa. 502; 35 Atl. 109, was practically overruled in Colgan v. Forest Oil Co., 194 Pa. 234; 45 Atl. 119; 75 Am. St. 695, and in Young v. Forest Oil Co., 194 Pa. 243; 45 Atl. 121; but the rule announced at first was followed in subsequent appeals of the same case. Kleppner v. Lemon, 197 Pa. 430; 47 Atl. 353; and Kleppner v. Lemon, 198 Pa. 581; 48 Atl. 483. In those cases the remedy is ordinarily an action for damages.

[45] Coffinberry v. Sun Oil Co., 68 Ohio St. 488; 67 N. E. 1069.

[46] Powers v. Bridgeport Oil Co., 238 Ill. 397; 87 N. E. 381.

[47] Buffalo Valley Oil, etc., Co. v. Jones, 75 Kan. 18; 88 Pac. 537.

Texas,[47*] and in the United States Circuit Court of Appeals,[48] it is held that a court of equity will enforce both implied and express covenants of the lease for its protection and development, or will cancel the lease so far as it relates to the unprotected part of the premises. In an earlier case,[49] the Supreme Court of Ohio held the remedy for a breach of an implied covenant is not by way of forfeiture of the lease, in whole or in part, but by an action for damages caused by its breach. This is the general rule.[50] If the lease provide for a forfeiture for a failure to develop it, or to pay a cash consideration for delay, upon certain stated times, this will not authorize a forfeiture for failure to operate after development; and "the remedy is for a breach of the implied covenants to reasonably operate the premises."[51] Where the lessee agreed to develop

[47*] J. M. Guffey Petroleum Co. v. Oliver (Tex.), 79 S. W. 884.

[48] Brewster v. Lanyon Zinc Co., 140 Fed. 801; 72 C. C. A. 213. See also Kellar v. Craig, 126 Fed. 630; 61 C. C. A. 366; Doddridge County Oil & Gas Co. v. Smith, 154 Fed. 970.

[49] Harris v. Ohio Oil Co., 57 Ohio St. 118; 48 N. E. 502.

[50] Bradford Oil Co. v. Blair, 113 Pa. 83; 4 Atl. 502; Duffield v. Rosenzweig, 150 Pa. 543; 24 Atl. 705; Blair v. Peck, 1 Penny 247; Harness v. Eastern Oil Co., 48 W. Va. 232; 38 S. E. 662; Ammons v. South Penn. Oil Co., 47 W. Va. 610; 35 S. E. 1004; Core v. New York Petroleum Co., 52 W. Va. 276; 43 S. E. 128; McGraw Oil Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1029; Kellar v. Craig, 126 Fed. 630; 61 C. C. A. 366; Doddridge Oil Co. v. Smith, 154 Fed. 970; Allegheny Oil Co. v. Snyder, 106 Fed. 764; 45 C. C. A. 60; J. M. Guffey Petroleum Co. v. Chaison Town Site (Tex. Civ. App.), 107 S. W. 609.

[51] Harris v. Ohio Oil Co., 57 Ohio St. 118; 48 N. E. 502; Core v. New York Petroleum Co., 52 W. Va. 276; 43 S. E. 128. "We have frequently held that, where there is no express condition requiring additional wells, but only an implied one, this will not forfeit. I have never been reconciled to the doctrine that for failure to drill additional wells the lessor must sue at law for damages, and equity will not cancel, unless for drawing from nearby territory and thus exhaust oil in the leasehold involved. I have asked: How many actions must the landowners bring? How can damages be measured? How can we see into the depths of the earth? But it has been so held, the reason is that equity will not, as a rule, enforce a forfeiture of an estate. It will not especially insert such a clause when the parties have not inserted it, especially when they did insert forfeiture for failure to drill or pay commutation, but did not insert forfeiture for failure to drill additional wells." Judge Brennan in McGraw Oil & Gas Co. v. Kennedy, *supra*.

the land and agreed to give the lessor a specified royalty, and subsequently a new agreement was entered into between the lessor and lessee providing for the operation of the only well on the property and limiting it to one-sixth of the output of the well's capacity on account of the low basis and inadequate storage facilities, it was held that though the instrument referred to the one well, it was intended to limit production upon the whole of the leased premises and the lessor had waived his right to require the lessee to produce larger amounts therefrom in the absence of conditions rendering it necessary for the production of the lease from drainage by wells on adjoining territory; but the conditions existing which required the land to be protected by putting down other wells, there was an implied obligation upon the lessee to use reasonable diligence to protect the property, which bound him to sink as many wells as the exercise of due diligence and care should suggest to an ordinarily prudent person engaged in the same undertaking under the same circumstances.[52]

§ 868. Ten acres for each well.—Failure to develop after drilling first paying well.

A contract or lease gave the lessee the privilege[53] to take the oil and gas in an one hundred tract of land with a covenant on the part of the lessee, to put down a well every ninety days from completion of the first one, or to surrender his rights, on all the land "except ten acres for each paying well." He drilled five paying wells, and then neglected and refused for an unreasonable length of time to further develop the premises. The lessor brought an action to quiet his title to

[52] J. M. Guffey Petroleum Co. v. Chaison Town Site (Tex. Civ. App.), 107 S. W. 609. A recovery was allowed for the actual damages sustained by the failure to drill other wells for the protection of the property.

In Pennsylvania it was held that, in an action against a lessee who had drilled one paying well upon the premises, for not putting down other wells to protect the territory against the effect of operations on adjoining land, it was error to charge that a failure to drill such well was a breach of an implied covenant imposing a liability in damages, in the absence of a reasonable excuse therefor. McKnight v. Manufacturers' Nat. Gas Co., 146 Pa. 185; 23 Atl. 164; 28 Am. St. 790.

A lessor seeking a cancellation of an oil lease after breach of an implied covenant must come with *clean hands* and act with *reasonable* diligence after discovery of his right to the forfeiture. Indiana Oil, etc., Co. v. McCrory, 42 Okl. 136; 140 Pac. 610.

[53] The court said it was an "incorporeal hereditament."

all the tract except fifty acres, but the court held he could not maintain such an action. The court held that the action did not lie because, as the grant was an incorporeal hereditament, there was no re-entry by him upon the unoccupied premises and he remained in possession thereof. The position of the landowner was stated as follows: "He seeks to have restored to him what, by the instrument in question, he granted to the appellees [the lessees]—the ownership and right to take the oil and gas under the land, not as to the entire tract, but as to certain parcels thereof described in the complaint, on which it is alleged the appellees have failed to drill wells as required by the contract. It is not sought to cancel the entire contract, or to forfeit the entire estate or interest created thereby, or to enforce a surrender of such entire estate or interest. A suit will lie to quiet the title of an owner of land as against a claim under a contract purporting to grant the oil and gas under its surface, with the right to enter for the purpose of seeking and taking the oil and gas, where such claim is unfounded because of the original insufficiency of the contract, or because of the termination of the rights and interests created thereby in some manner recognizable as sufficient to work such a determination of such rights and interests. To enable a court of equity to quiet title to land, or to adjudge the forfeiture of an interest therein under a lease or a grant, or to enforce a conveyance of land, the court must ascertain and describe the real estate with certainty and exactness. The complaint, as is asserted in argument by counsel for the appellant, describes definitely certain parcels of land as to which the appellant desires to be restored to the rights and interests therein which are granted by the written agreement, but, upon the whole facts stated in the pleading, it appears that these definite parcels are arbitrarily selected by the appellant; and, if it could be said that in other respects he is entitled to any relief, the complaint does not furnish facts which would enable the court to describe definitely any parcels out of the one hundred acres to which it could apply the relief. The contract required the party of the second part to complete a well in every period of ninety days from the completion of the first well, if it proved to be a paying well, or to surrender the lease, excepting ten acres for each paying well. The contract did not further

describe these tracts of ten acres each, which were to be excepted out of the one hundred acres; and, without a sufficient description thereof, there could be no definite description of the remainder of the one hundred acres, the rights of the appellees in which were to be surrendered. As appears from the complaint, and the plats made a part thereof, it is manifest that it would be possible to bound in many different shapes ten-acre tracts on each of which would be one of the five wells already drilled."[54] "It plainly appears that the appellees are not carrying out the purposes of the contracting parties, and that the appellant [lessor] is suffering loss in consequence of the conduct of the appellees [the lessees]. The appellant does not desire to drill additional wells himself. He may be unable to do so. He can, however, procure the drilling by other persons and thereby obtain an increase of income from his land, and prevent the loss of oil which is being taken on adjoining land, if the contract with the appellees and their conduct thereunder did not stand in the way. The grant was made subject to conditions expressed in the *habendum*. The grantee was to have and to hold 'the above premises on the following conditions,' etc.; and the understanding of the parties was stated to be that 'all conditions between the parties' should extend 'to their heirs, executors and assigns.' The second party covenanted to complete a well every ninety days from the completion of the first well, if it should be a paying well, or to surrender the lease, excepting ten acres for each paying well. It is true that in an action for damages for breach of covenant it could not be determined how much oil could be obtained from the additional well if drilled; but this covenant is among the expressed conditions upon which the appellees have and hold, and it is not for the appellees to say that it cannot be known that oil or gas will be reached by drilling a well upon a particular tract of land. Their obligation to continue to drill wells was fixed when the first well proved to be a paying well. For the purposes of their contract, it is an ascertained fact that the remainder of the tract is a paying field. The provision in question expresses the

[54] "The case of Jones v. Mount, 30 Ind. App. 59; 63 N. E. 798, cited by the appellees, seems to sustain the conclusion that this complaint was insufficient because of the impossibility of definitely describing any parcels of land to be excepted out of the tract of 100 acres."

obligation of the appellees in the alternative, thereby devolving upon them the making of a choice as to the course to be pursued by them. It is their duty to make such choice, and pursue one or the other of the alternative courses indicated. For a long period, however, from ninety days after September 10, 1900, until the commencement of this action, about two years later, the appellant presumably had been accepting his share of oil from the five wells, and silently allowing the appellees to abstain from further development or the surrender, provided for in the contract; and the contract did not certainly prescribe how many wells should be drilled, or designate exact locations for any wells. It would be equitable, it would seem, that the appellant should make a demand upon the appellees to exercise their choice before resort by him to the court. While the appellant, having neglected to insert definite descriptions in the contract, may not arbitrarily dictate the outline of the parcels to be excepted with the paying wells, it is competent for the appellees to do so, and no valid objection on the part of the appellant could prevent them from doing so. If the appellees should refuse or neglect for an unreasonable time after demand to enable the appellant to have such use of his land as the contracting parties contemplated, and should for such reason be held to have forfeited all their rights and interests for the future under the contract, their great loss would be attributable solely to their own wrong."[55] In another case a landowner leased eighty acres for exploration and development of the oil and gas thereon. The contract contemplated that eight wells might be drilled on the tract. But one well was drilled, and the lessor brought suit to quiet title. The contract provided that "on failure to drill any of these wells within the specified time, the second party [the lessee] shall surrender the right to drill on all of this grant excepting ten acres for each well drilled." The first paragraph of the complaint was to quiet title to the whole eighty acres, and the other to all of them except a specific ten acres in a square form surrounding the well completed. "Appellee," said the court, "cannot recover under either of

[55] Monaghan v. Mount, 36 Ind. 188; 74 N. E. 579. The court concludes the opinion by saying: "We will not be understood, however, as intending to render a decision in advance of presentation and argument of this matter."

said paragraphs of complaint, because the provision concerning a surrender is so far uncertain that it cannot be said that the failure to drill the remaining seven wells *per se* entitled him to all or to any particular portion of the real estate." The landowner contended that the whole contract was void for uncertainty, but the court held otherwise. "It is obvious," said the court, "that such a case as this does not fall within the principle of that class of cases in which it is adjudged that nothing passes by the deed where the terms are so uncertain that the intention of the parties cannot be ascertained. It will be observed that the contract contains a covenant upon the part of the grantee to surrender. This, within limits, gave the grantee the power of selection, and the mere fact that the land which he might elect to reconvey was originally uncertain does not prevent an enforcement of the undertaking according to its terms."[56] "There is no more legal uncertainty in such a matter as this than there is in the case of a way of necessity, where the reservation is implied as resting on the presumed intention of the parties. The right is to be reasonably exercised, having in view the interests of both parties, as in such a case as the one just mentioned, and if it becomes necessary the reservation will be located by decree."[57] From these cases it is clear that the remedy of the lessor in such an instance is to make a demand upon the lessee to proceed and develop the land fully, accompanied with a statement that unless the land be developed within a reasonable time the lessor would apply to a court of equity to set aside ten acres surrounding each paying well and to cancel the lease as to remainder of the leased premises.[58]

[56] "The principal here announced was exhaustively considered upon the authorities in Smith v. Furbish, 68 N. H. 123; 44 Atl. 398; 47 L. R. A. 226. And see, also, Gardner v. Webster, 64 N. H. 520; 15 Atl. 144; Dull v. Blum, 68 Tex. 299; 4 S. W. 489; Nye v. Moody, 70 Tex. 434; 8 S. W. 606; Dohoney v. Womack, 1 Tex. Civ. App. 354; 19 S. W. 883; 20 S. W. 950; Waters v. Ben, 52 N. J. Eq. 787; 29 Atl. 590; Lane v. Allen, 162 Ill. 426; 44 N. E. 831; 1 Jones, Real Property Conveying, § 334."

[57] Jones v. Mount, 166 Ind. 570; 77 N. E. 1089.

[58] For an instance where it was held that the lease should be cancelled as to the undeveloped part of the leased premises, see Coffinberry v. Sun Oil Co., 68 Ohio St. 488; 67 N. E. 1069.

§ 869. Measure of damages for breach of implied covenant to develop or operate.

The measure of damages for a breach of an implied covenant to develop land or operate it after development is as follows: Ascertain how much more oil the lessor ought to have received than he actually did receive, and the value of it during the time when it should have been delivered to him; from this deduct the cost of providing what ought to have been produced at the time, under the circumstances, and with the appliances then known; and add to this remainder the interest on it from the time when the oil ought to have been produced to the time of the trial.[59] If the lease give the lessee the exclusive right to bore on the premises for oil or gas, and restrict the operations to certain sites, and the lessor or his grantee drill wells on the leasehold outside of the sites designated in the lease, the lessee's measure of damages is the difference in value of the leasehold before and after the injury was committed. The damages cannot be estimated by the amount of oil or gas which the new wells might drain from the old wells, the proof of damages upon this basis being impracticable in the nature of the case.[60]

§ 870. Declaration of forfeiture after waiver has been made.

If there has been a waiver by the lessor of a forfeiture incurred by the lessee, the former cannot declare a forfeiture because of such act of forfeiture. If he desires to terminate the lease he must give notice to the lessee of his intention to do so, which must be given a sufficient time before the date for declaring a forfeiture as will enable the lessee to comply with the terms of the lease. If no well has been drilled, and that is the reason for the forfeiture, then sufficient time must be given to drill a well; and if the ground is that no development has been begun, then a sufficient time must be given to enable him to enter and commence explorations. If after notice given a sufficient time has elapsed to enable the lessee

[59] §§ 111, 112, 113. Bradford Oil Co. v. Blair, 113 Pa. 83; 4 Atl. 218; J. M. Duffey Petroleum Co. v. Chaison Town Site Co. (Tex. Civ. App.), 107 S. W. 609.

[60] § 113. Duffield v. Rosenzweig, 150 Pa. 543; 24 Atl. 705; Duffield v. Rosenzweig, 144 Pa. 520; 23 Atl. 4.

to do what was originally necessary to be done to prevent a forfeiture of the lease and the lessee still remains in default, the lessor at the time fixed in such notice may declare a forfeiture and terminate the lease as there had been no waiver.[61]

§ 871. Paying quantities.

Elsewhere has been discussed whether a lease would or would not be canceled on the ground that it was not producing oil or gas in paying quantities. If, in fact, the production is not sufficient to pay a profit to the lessee upon the expense of production the lessor may declare a forfeiture and recover possession of the property in an action of ejectment, or bring an action in equity to cancel the lease as a cloud upon the title.[62] If the premises have been developed in part, and the lessee refuses to develop the remainder, and such remainder should be developed to protect its lines from drainage through wells on adjoining properties, or the lessee claims his right to develop such remainder on the ground that the leased premises is producing oil in paying quantities, the lessor may, after proper notice to develop them, maintain an action to cancel the lease as to the unprotected or undeveloped remainder, at least upon satisfactory proof that the failure of the lessee to drill additional wells amounts to a fraud upon him, the lessor.[63] Where a lease provided for a definite term after which it was to continue so long as oil or gas was found in paying quantities, and it contained a clause that if any well produced gas in sufficient quantities to justify marketing, the lessee should pay a yearly rental for each well so long as gas from it was sold, it was held that, after the gas rental clause becomes operative by the finding of gas in paying quantities and the

[61] § 208. Steiner v. Marks, 172 Pa. 400; 33 Atl. 695; Lynch v. Versailles Fuel, etc., Co., 165 Pa. 518; 30 Atl. 984; Consumers' Gas Trust Co. v. Littler, 163 Ind. 320; 70 N. E. 363; Consumers' Gas Trust Co. v. Worth, 163 Ind. 141; 71 N. E. 489; Consumers' Gas Trust Co. v. Ink, 163 Ind. 174; 71 N. E. 477.

[62] §§ 134, 135. Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Barnsdall v. Boley, 119 Fed. 191; Bay State Petroleum Co. v. Penn Lubricating Co., 121 Ky. 637; 87 S. W. 1102; 27 Ky. L. Rep. 1133; Murdock-West Co. v. Logan, 69 Ohio St. 514; 69 N. E. 984.

[63] Young v. Forest Oil Co., 194 Pa. 243; 45 Atl. 1021.

marketing of it, the lease not providing that the lessee may surrender it at any time upon the payment of all rentals due, the lessee cannot terminate the lease without giving notice to the lessor of his intention to do so; and the lessor could recover the gas rental up to the time of surrender, or until the lease terminated it after notice of his intention to do so.[64] If the lessor's compensation, in such an instance, is a royalty of the oil produced and an annual rental for gas sold off the premises, and the lessee discovers either gas or oil in paying quantities, after the expiration of the fixed period and after the fact that oil or gas is not being found and produced in paying quantities becomes susceptible of (clear) proof, the lessor may terminate the lease and re-enter or recover possession by an action in ejectment. In such an instance, the tenancy as to the surface of the land is in the nature of a tenancy at will.[65] If gas be found in paying quantities under such a lease, the lessee must market it or show some reason for not doing so. He is not required to market the gas at a loss, but only at a reasonable profit, and in determining whether it could be so marketed, the distance to market, the expense of marketing, and every circumstance of a similar kind should be taken into consideration. If he discovers gas in paying quantities, he cannot shut the gas in and hold the lease without the payment of the rent that can be derived from marketing it, or the gas rental, and for this he is liable to the lessor.[66]

§ 872. Forfeiture by abandonment.

If a lease contain a rental clause, but is silent as to the effect upon the lease if the rent be not paid, the failure of the lessee either to pay the rent or to enter and explore for oil and gas within a reasonable time will empower the lessor the right to declare a forfeiture of the lease upon the grounds of abandonment. A court of equity will cancel it upon the presumption that the lessee has abandoned it.[67] If the exploration by the lessee has

[64] § 148. Double v. Union Heat., etc., Co., 172 Pa. 388; 33 Atl. 694.

[65] Cassell v. Crothers, 193 Pa. 359; 44 Atl. 446.

[66] §§ 148, 283. Iams v. Carnegie Nat. Gas Co., 194 Pa. 72; 45 Atl. 54.

[67] § 212. Smith v. Root, 66 W. Va. 633; 66 S. E. 1005; 30 L. R. A. (N. S.) 176; Logansport, etc., Gas

proven unsuccessful, and he then physically abandons the premises, the lessor, after a reasonable time given the lessee to re-enter and continue his explorations, may proceed in equity for relief by alleging the entry and exploration and failure to find oil or gas and the subsequent physical abandonment of the premises, and upon proof of these facts the court will presume that the lessee has abandoned the search and will cancel the lease.[68] If the lease specifies the test that shall be made, and provides for no other, and the lessee enters and makes such test, which proves unsuccessful, and then physically abandons the premises, not returning within a reasonable time or not resuming operations, on proof of actual cessation of search it need not be shown that the intention of the lessee was to abandon the premises, because the lessee has performed what the express terms of the lease provided for, and his intentions are shown by the proof of his acts.[68*] If, after discovering oil or gas, the lessee fails to operate the well, the lessor, after giving him a reasonable time within which to operate, may declare the lease forfeited and bring his action in a court of equity to cancel it.[69] If it contains a

Co. v. Seegar, 165 Ind. 1; 74 N. E. 500; Bluestone Coal Co. v. Bell, 38 W. Va. 297; 18 S. E. 493; Buffalo Valley Oil & Gas Co. v. Jones, 75 Kan. 18; 88 Pac. 537; Crawford v. Richie, 43 W. Va. 252; 27 S. E. 220; Florence Oil, etc., Co. v. McCumber, 38 Colo. 366; 88 Pac. 265; Tennessee, etc., Co. v. Brown, 131 Fed. 696; 65 C. C. A. 524; Murray v. Graham, 117 La. 1023; 42 So. 489; Logan Nat. Gas, etc., Co. v. Great Southern Gas Co., 126 Fed. 623; 61 C. C. A. 359; Kimball Oil Co. v. Keeton (Ky.), 101 S. W. 887; 31 Ky. L. Rep. 146; Flannagan v. Marsh (Ky.), 105 S. W. 724; 32 Ky. L. Rep. 184; Federal Oil Co. v. Western Oil Co., 121 Fed. 674; 57 C. C. A. 428; Mills v. Hartz, 77 Kan. 218; 94 Pac. 142; McIntosh v. Robb, 4 Cal. App. 484; 88 Pac. 517.

[68] § 212. Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 987; 44 L. R. A. 107; Ohio Oil Co. v. Detamore, 165 Ind. 243; 73 N. E. 906; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. 655; 59 L. R. A. 566; Federal Betterment Co. v. Blaes, 75 Kan. 69; 88 Pac. 555; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Foster v. Elk Fork Oil & Gas Co., 90 Fed. 178; 32 C. C. A. 560; affirming 84 Fed. 839; Calhoun v. Neely, 201 Pa. 97; 50 Atl. 967; Sult v. Hochstetter Oil Co., 63 W. Va. 317; 61 S. E. 307.

[68*] § 161. Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 987; 44 L. R. A. 1077.

[69] § 161. Heintz v. Shortt, 149 Pa. 286; 24 Atl. 316.

In Indiana, if the lessor accept rental for failure to develop the leasehold, he cannot declare a forfeiture during such period; but he may, at the next rental period, decline to accept the rent and demand

rental clause, but is silent as to the effect of non-payment of the rent at maturity, and the lessee has not actually entered on the land to develop it, the lessor may institute a proceeding to cancel the lease on the ground of abandonment or relinquishment which then becomes a mere matter of intention, and this intention may be established by proof of such facts and circumstances as evidence a voluntary waiver of his rights.[70] Where the lessee has actually entered and physically abandoned the premises, the proof of such acts shows his intention to abandon his rights under the lease; but if he has not entered and assumed physical possession, then his intention to abandon must be established by such facts and circumstances as show a voluntary waiver or relinquishment of his rights.[71] If the lease be owned by several lessees, a majority of them may agree to commence developments within a certain time, and if they make default, the lessor may declare and enforce a forfeiture of the whole lease.[72] Even though a lease does not provide that a failure to pay the rental shall work a forfeiture, yet the lessor may proceed for the rental due, and upon failure to recover it, he may declare the lease forfeited.[73]

that the leasehold be developed; and if the lessee does not enter within a reasonable time and begin operations, he may declare a forfeiture and procure a cancellation of the lease. Dill v. Fraze, 169 Ind. 53; 79 N. E. 971.

[70] Smith v. Root, 66 W. Va. 633; 66 S. E. 1005; 30 L. R. A. (N. S.) 176.

[71] Smith v. Root, 66 W. Va. 633; 66 S. E. 1005; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107.

[72] § 160. Hooks v. Forst, 165 Pa. 238; 30 Atl. 846.

[73] § 180. Marshall v. Forest Oil Co., 198 Pa. 83; 47 Atl. 927.

That a lease may be cancelled by a court of equity for failure to develop the leased premises, see Hukill v. Guffey, 37 W. Va. 425; 16 S. E. 544; Brewster v. Lanyon Zinc Co., 140 Fed. 801; 72 C. C. A. 213; Gadberry v. Ohio & Indiana Consolidated Gas Co., 162 Ind. 9; 67 N. E. 259; 62 L. R. A. 895; Munroe v. Armstrong, 96 Pa. 307; Foster v. Elk Fork, etc., Co., 90 Fed. 178; 32 C. C. A. 560; Federal Oil Co. v. Western Oil Co., 112 Fed. 373.

"Where there has been a cause of forfeiture, followed by an entry upon the part of the grantor, so that the title has been lost, it is not strictly the enforcing of a forfeiture for a court of equity to declare a cancellation of the instrument. [Citing McClellan v. Coffin, 93 Ind. 456, and Birmingham v. Leason, 77 Me. 494.] But even in a case of this kind, where the circumstances do not permit of an entry, the forfeiture may be, in effect, enforced by suit in equity. Forfeitures are usually against conscience, and without equity, and it is for these reasons

§ 873. Landowner's remedy for unlawful extraction of oil and gas.

Oil and gas in place are a part of the land, and their unlawful extraction by one lawfully in possession is waste, and by one not lawfully in possession, trespass.[74] To prevent this unlawful extraction a court of equity will enjoin those making it, upon the ground of irreparable injury.[75] A

that courts of chancery, ordinarily refuse relief in such cases, but an exception to the rule must exist where it be against equity to permit the defendant to longer assert his title. . . . And the completion of the first well, having cut off the liquidated damages of one dollar per day for non-completion, and that no gas has been disposed of off the premises, there remains no measure of damages, for while the damages would be substantial, they would be speculative. [Citing Foster v. Elk Fork, etc., Co., 90 Fed. 178; 32 C. C. A. 560; Federal Oil Co. v. Western Oil Co., 112 Fed. 373.] The lack of any other remedy, and the danger that the gas might be withdrawn from the wells or other lands makes a case of this kind appeal to the conscience of the chancellor, and calls upon him to enforce the incurred forfeiture by removing the cloud from the title." Gadberry v. Ohio & Indiana, etc., Gas Co., 162 Ind. 9; 67 N. E. 259; 62 L. R. A. 895.

[74] Williamson v. Jones, 39 W. Va. 231; 19 S. E. 436; Murray v. Allred, 100 Tenn. 100; 43 S. W. 355; 66 Am. St. 740; Williamson v. Jones, 43 W. Va. 562; 27 S. E. 411; Duffield v. Hue, 136 Pa. 602; 20 Atl. 526; South Penn. Oil Co. v. McIntire, 44 W. Va. 296; 28 S. E. 922; Westmoreland Nat. Gas Co. v. DeWitt, 130 Pa. 325; 18 Atl. 724; 5 L. R. A. 731; Wilson v. Yost, 43 W. Va. 826; 28 S. E. 781; Haskell v. Sutton, 53 W. Va. 206; 44 S. E. 533; Sult v. Hochstetter Oil Co., 63 W. Va. 317; 61 S. E. 307; Moore v. Jennings, 47 W. Va. 181; 34 S. E. 792; Blakley v. Marshall, 174 Pa. 425; 34 Atl. 564; Freer v. Davis, 52 W. Va. 35; 43 S. E. 172; Marshall v. Mellon, 179 Pa. 371; 36 Atl. 201; 35 L. R. A. 216; Isam v. Rex Crude Oil Co., 147 Cal. 659; 82 Pac. 317; Bettman v. Harness, 42 W. Va. 433; 26 S. E. 271; 36 L. R. A. 566; Preston v. White, 57 W. Va. 278; 50 S. E. 236; Detlor v. Holland, 57 Ohio St. 492; 49 N. E. 690; 40 L. R. A. 266; Stoughton's Appeal, 88 Pa. 198; Lanyon Zinc Co. v. Freeman, 68 Kan. 691; 75 Pac. 995; Poe v. Ulrey, 233 Ill. 56; 84 N. E. 46; Hughes v. United Pipeline, 119 N. Y. 423; 23 N. E. 1042.

[75] Bettman v. Harness, 42 W. Va. 423; 26 S. E. 271; 36 L. R. A. 566; Murray v. Allred, 100 Tenn. 100; 43 S. W. 355; 66 Am. St. 740; Williamson v. Jones, 39 W. Va. 231; 19 S. E. 436; Williamson v. Jones, 43 W. Va. 562; 27 S. E. 411; Haskell v. Sutton, 53 W. Va. 206; 44 S. E. 533; Duffield v. Hue, 136 Pa. 602; 20 Atl. 526; Moore v. Jennings, 47 W. Va. 181; 34 S. E. 279; Isam v. Rex Crude Oil Co., 147 Cal. 659; 82 Pac. 317; Detlor v. Holland, 57 Ohio St. 492; 49 N. E. 690; 40 L. R. A. 266; Lanyon Zinc Co. v. Freeman, 68 Kan. 691; 75 Pac. 995.

remainderman has the same remedy, even though the life tenant has granted a lease under which the defendant is operating.[76] But a court of equity will not settle the title and boundaries of oil land as between either the claimants to the title or the claimants of conflicting oil leases made by the respective claimants, if the question of title be one of law; but it will restrain the production and marketing of the oil or gas pending proceedings at law to settle the question of title.[77] If there be no controversy as to the facts in relation to the title and it is one of law, a claimant of an oil or gas lease may maintain a bill for injunction and a receiver against an adverse claimant to the title and an adverse lessee.[78] And if there be a dispute concerning the boundary line between oil or gas tracts, a lessee of one may maintain a bill in equity to settle the line as against the lessee of the other claimant, where he alleges that the defendant lessee is drilling across the line upon the premises included in his, the plaintiff's, lease. In such an instance, all claimants, the lessors and the lessees under all leases and those interested with them must be made defendants.[79] If oil or gas wells exist on a tract of land, and a person be given a life estate therein, he is entitled to the oil or gas,[80] and he may maintain an action in equity for an accounting of the royalties due him.[81] Of course, the owner of land leasing it may maintain a suit in equity for an accounting of the royalties. A tenant for life may not open wells and take out oil or gas, and if he do and has converted it to his own use, he has no right to have these proceeds invested so that he may have the interest thereon during his life estate, for such proceeds goes at once to the next vested estate of

[76] Williamson v. Jones, 39 W. Va. 231; 19 S. E. 436; Williamson v. Jones, 43 W. Va. 562; 27 S. E. 411; Haskell v. Sutton, 53 W. Va. 206; 44 S. E. 533; South Penn. Oil Co. v. McIntire, 44 W. Va. 296; 28 S. E. 922; Stoughton's Appeal, 88 Pa. 198; Blakley v. Marshall, 174 Pa. 425; 34 Atl. 564; Wilson v. Youst, 43 W. Va. 826; 28 S. E. 781.

[77] Freer v. Davis, 52 W. Va. 1; 43 S. E. 164; Freer v. Davis, 52 W. Va. 35; 43 S. E. 172.

[78] Sult v. Hochstetter Oil Co., 63 W. Va. 317; 61 S. E. 307.

[79] Moore v. Jennings, 47 W. Va. 181; 34 S. E. 793.

[80] § 299. Woodburn's Estate, 138 Pa. 606; 21 Atl. 16; Koen v. Bartlett, 41 W. Va. 559; 23 S. E. 664; 31 L. R. A. 128.

[81] § 304. Wilson v. Youst, 43 W. Va. 826; 28 S. E. 78; Blakley v. Marshall, 174 Pa. 425; 34 Atl. 564.

inheritance, and the owner of such vested estate may maintain a bill in equity against such life tenant for an accounting.[82] If a trespasser or other wrongdoer take oil from the land, he does not acquire title thereto, and the owner of the land may pursue and reclaim it wherever he can find it.[83]

§ 874. Trespass—Void lease—Receiver.

If a person enters upon land, without authority, or under a void lease, drills a well or wells thereon, takes oil or gas therefrom, removes it from the premises, and threatens to drill other wells and take the oil or gas produced therefrom, a court of equity will perpetually enjoin him from all operations, even under such void lease, and will proceed to a final determination of all the matters at issue therein, although the plaintiff may have a remedy at law against the wrongdoer for the trespass.[84] So a lessor, who has not even developed the land or taken physical possession of it, has such an inchoate interest in such land as enables him to maintain proceedings for an injunction to prevent a wrongdoer from committing waste by the extraction of oil and gas.[85] A court of equity will cancel a void lease where the lessee is attempting to operate under it, and will enjoin his further operations.[86] So the owner of land across which a railway company has an easement for a right of way may enjoin the sinking of an oil or gas well on such right of way, where it will tend to diminish the flow of oil or gas on his own premises.[87] If

[82] § 304. Williamson v. Jones, 43 W. Va. 562; 27 S. E. 115.

[83] § 27. Hughes v. United Pipelines, 119 N. Y. 423; 23 N. E. 1042.

[84] Haskell v. Sutton, 53 W. Va. 206; 44 S. E. 533; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 762; Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 392; 68 N. E. 1020; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Huggins v. Daley, 99 Fed. 606; 40 C. C. A. 12; Starn v. Huffman, 62 W. Va. 422; 59 S. E. 176; McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027; 28 L. R. A. (N. S.) 959; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. 933.

[85] § 110. Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. 93.

[86] McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027; 28 L. R. A. (N. S.) 959; Huggins v. Daley, 99 Fed. 606; 40 C. C. A. 12; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 762.

[87] Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 392; 68 N. E. 1020.

the landowner bring an action to restrain a person operating under a void lease, and to cancel it, he should make all persons affected parties thereto. In cases of extreme necessity the court will appoint a receiver to protect the landowner's rights.[88]

§ 875. Want of mutuality.

If no valuable consideration be paid for the lease, and it does not bind the lessee to carry out its covenants, but gives him the right to defeat it at any time and relieve himself from the payment of any consideration therefor, the lessor may terminate it at any time without any legal proceedings or formality whatever, for it does not create any estate other than the mere optional right of entry.[90] The execution of a second lease, the death of the lessor, the sale of the property by him, or its sale under judicial proceedings, is an effectual termination of the lease.[91] In Kentucky, if the lease provide that the lessee may, by the payment of a specified sum, surrender the lease at any time and be relieved of all obligations, the lessor may also terminate the lease at any time before the lessee enters and before he has expended any money in explorations. After entry and exploration by the lessee the lessor may revoke the lease or license and terminate it upon tender or payment to the lessee the value of all labor done and services rendered by him in explorations.[92] If the terms of the lease are unfair, unjust and against good conscience, the lessor may declare a forfeiture and refuse to permit the lessee to enter and explore the premises on the terms of the lease, and a court of equity, upon suit by the lessee, will not decree specific performance.[93]

[88] Sult v. Hochstetter Oil Co., 63 W. Va. 317; 61 S. E. 307.

[90] § 76. Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 293; Martel v. Jennings-Heywood Oil Co., 114 La. 903; 38 So. 253; Eclipse Oil Co. v. Garner, 53 W. Va. 151; 44 S. E. 131; Roberts v. McFadden, 32 Tex. Civ. App. 47; 74 S. W. 105; Federal Oil Co. v. Western Oil Co., 112 Fed. 373; Federal Oil Co. v. Western Oil Co., 121 Fed. 674; 57 C. C. A. 528; Young v. McIlhenny (Ky.), 116 S. W. 728; Tennessee Oil, etc., Co. v. Brown, 131 Fed. 696; 65 C. C. A. 524.

[91] National Oil & Pipeline Co. v. Teel, 95 Tex. 586; 68 S. W. 979; affirming 67 S. W. 545; Roberts v. McFadden, 32 Tex. Civ. App. 47; 74 S. W. 105; Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. 933; Hodges v. Brice, 32 Tex. Civ. App. 358; 74 S. W. 590; Eclipse Oil Co. v. Garner, 53 W. Va. 151; 44 S. E. 131.

[92] J. M. Guffey Petroleum Co. v. Oliver (Ky.), 79 S. W. 884.

[93] Federal Oil Co. v. Western Oil Co., 121 Fed. 674; 57 C. C. A. 528; Waterford Oil & Gas Co. v. Shipman, 233 Ill. 9; 84 N. E. 53; Great

§ 876. Tenant in common or joint tenant.

If a joint tenant, or tenant in common, of lands, execute an oil and gas lease for the entire tract of land, the remedy of his co-tenants is by bill in equity for an injunction, wherein they may recover all damages they have sustained by the unlawful extraction of oil and gas.[94] A tenant who has received royalties under a lease of the land of the tenancy, may be required to account to his co-tenants for their share of them.[95] If one joint tenant or tenant in common be lawfully in possession and claiming title to the whole property, executes a lease for the entire property under which the lessee enters and produces gas and oil and converts the working interest to his own use, or if such tenant himself develops the premises, his co-tenants may enjoin the operations and recover their proportion of the production, less the actual cost of production and development, but not including the cost of drilling unproductive wells.[96] If a tenant in common take possession of the joint premises to the exclusion of his co-tenant and lease them to a third party for the purpose of extraction of oil therefrom, a specified portion of such oil to be paid as royalty, the tenant so excluded may, if he choose, permit the lessee to continue operations under the lease, and require him to account for such a proportion of the royalties as his interest in the oil in place bears to the whole thereof. In such an instance the excluded owner may enjoin the abstraction of oil on the ground that it is a waste.[96a]

§ 877. When dry hole developed.

If, under the lease, the lessor is to receive a percentage of the oil as a royalty, or a rental for such well producing gas (in paying quantities), and the lessee drills one or more dry

Western Oil Co. v. Carpenter, 43 Tex. Civ. App. 229; 95 S. W. 57.

[94] §323. Williamson v. Jones, 43 W. Va. 562; 27 S. E. 411.

The tenant, not joining in the lease, may not only enjoin the operations, but he may recover his proportion of the oil and gas produced by the lessee, without being charged with any cost of development or production. Ziegler v. Brenneman, 237 Ill. 15; 86 N. E. 597.

[95] § 320. Williamson v. Jones, 43 W. Va. 562; 27 S. E. 411.

[96] §§ 316, 317. Williamson v. Jones, 43 W. Va. 562; 27 S. E. 411; Stewart v. Tennant, 52 W. Va. 559; 44 S. E. 223; McNeely v. South Penn. Oil Co., 58 W. Va. 438; 44 S. E. 508; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 620; Wilson v. Youst, 43 W. Va. 826; 28 S. E. 781; Eakins v. Hawkins, 48 W. Va. 264; 37 S. E. 622; Haskell v. Sutton, 53 W. Va. 206; 44 S. E. 533; Headley v. Hoopengarner, 60 W. Va. 626; 55 S. E. 144.

[96a] Paxton v. Benedum-Trees Oil Co. (W. Va.), 92 S. E. 472; Williamson v. Jones, 43 W. Va. 562; 27 S. E. 411; 38 L. R. A. 694; 64 Am. St. 891; South Penn. Oil Co. v. Haight, 71 W. Va. 720; 78 S. E. 759.

wells, and thereafter fails, within a reasonable time to continue explorations or pay the land rental stipulated for, the lessor may declare a forfeiture upon the ground of abandonment and recover possession of the property, or he may bring a suit in equity to cancel the lease.[97] The landowner may execute a new lease and the second lessee will be entitled to secure a cancellation of the first lease and be quieted in his title and possession under his own lease.[98]

§ 878. Payment of rental in bank.

If the rental for delay is payable in bank, and the lessee fail to thus make payment, the lessor may declare a forfeiture of the lease; and if he do so, a deposit in the bank by the lessee thereafter of the unpaid rentals will not revive the lease, and the lessor or the second lessor may procure a cancellation in equity of the lease, upon the grounds of abandonment or forfeiture for other causes.[99]

§ 879. Life tenant's remedy.

During his life estate in lands a life tenant is entitled to interest on the royalties on oil received and on rentals on gas taken from such lands after such life estate has accrued; and he may, by a bill in equity, have his rights protected and his right to the receipt of such interest quieted.[100] If there be

[97] § 159. Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107; Ziegler v. Dailey, 37 Ind. App. 240; 76 N. E. 819; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; Rawlings v. Armel, 70 Kan. 778; 79 Pac. 683; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. 655; 59 L. R. A. 566; Florence Oil, etc., Co. v. Ormer, 19 Colo. App. 79; 73 Pac. 678; Venture Oil Co. v. Fretts, 152 Pa. 451; 35 Atl. 732; Foster v. Elk Fork Oil & Gas Co., 90 Fed. 178; 32 C. C. A. 560; Aye v. Philadelphia Co., 193 Pa. 451; 44 Alt. 655.

[98] Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. 655; 59 L. R. A. 566; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Barnhart v. Lockwood, 152 Pa. 82; 25 Atl. 237; Foster v. Elk Fork Oil & Gas Co., 90 Fed. 178; 32 C. C. A. 560.

[99] Smith v. Root, 66 W. Va. 633; 66 S. E. 1005; 30 L. R. A. (N. S.) 176; Puritan Oil Co. v. Myers, 39 Ind. App. 695; 80 N. E. 851.

[100] Wilson v. Youst, 43 W. Va. 826; 28 S. E. 781; Eakins v. Hawkins, 52 W. Va. 124; 43 S. E. 211; Ammons v. Ammons, 50 W. Va. 390; 40 S. E. 490; Stewart v. Tennant, 52 W. Va. 559; 44 S. E. 223.

wells when his life estate arises, the life tenant is entitled to the royalties themselves and the rental for gas during the continuance of his estate; and a court of equity will protect him in his rights. But he cannot drill additional wells.[1]

§ 880. Remainderman's remedy.

If a life tenant takes out gas or oil by drilling wells or leases the premises to another who drills wells and takes out gas or oil, the remainderman may enjoin the production and recover from the life tenant or his lessee the value of the oil or gas so taken by him.[2] If there be danger the lands will be drained by the development of adjacent lands, so much so that there be no imperative need therefor, the remainderman may, by proceedings in equity, secure the oil or gas to be produced, or otherwise secured for their protection, where no harm will be done to the life tenant, or where he is compensated. A compensation in such an instance for the life tenant is interest on the royalties or gas rentals during the continuance of the life estate.[3]

§ 881. Failure of lessee to begin operations.

If the lessee does not begin operations within the time specified in the lease, and it provides that it shall be null and void unless a well be commenced within that time and completed within another specified time, and the lessee fails within the specified time to begin operations in good faith by commencing to drill a well and fails to complete it within the time specified, the lessor may declare a forfeiture and maintain an action in a court of equity to cancel the lease and quiet his title.[4] If the lease provide that the lessee must commence operations within a certain time and within a certain other

[1] § 299. Koen v. Bartlett, 41 W. Va. 559; 23 S. E. 664; 56 Am. St. 884; 31 L. R. A. 128.

[2] § 304. Eakins v. Hawkins, 48 W. Va. 364; 37 S. E. 622; Stewart v. Tennant, 52 W. Va. 559; 44 S. E. 223; Williamson v. Jones, 43 W. Va. 563; 27 S. E. 411; Richmond Nat. Gas Co. v. Davenport, 37 Ind. App. 25; 76 N. E. 525. No doubt the life tenant would be liable for the oil and gas his lessee extracted from the lands.

[3] Williamson v. Jones, 43 W. Va. 563; 27 S. E. 411.

[4] § 141. Huggins v. Daley, 99 Fed. 606; 40 C. C. A. 12; 48 L. R. A. 320; Detlor v. Holland, 57 Ohio St. 492; 49 N. E. 690; 40 L. R. A. 266.

time complete a test well, upon the lessee's bringing a suit for possession of the premises or in equity for an injunction against the lessor, the latter may defeat the lessee's action by showing a non-compliance with the terms of the lease in this respect.[5]

§ 882. Drainage of premises.

If a landowner drill a well so near his boundary line as to drain the oil or gas from his neighbor's adjacent land, the latter cannot enjoin him or recover damages because of the damage to his land. His only remedy is to drill a sufficient number of off-set wells along the line, and in such proximity as he may desire, to protect his property from drainage.[6] If a lessee holds leases on two adjacent tracts of land, owned by different persons, he cannot develop one of them so as to drain the other. If he does so, relief in equity will be afforded the injured owner;[7] but he may drill wells on one tract close to the line of the other and draw oil or gas from the latter, if he drills wells on such other land for its protection, or in good faith endeavors to develop them in the performance of his duty as lessee.[8]

§ 883. Landowner's liability for injuries caused by drilling well on his land.—Salt water.

If a landowner drill an oil well on his land from which salt water escapes to the injury of another, he may defeat a recovery by proof that the use of his well was a reasonable one, that he exercised due care to avoid the injury, that he was not actuated by malice, and that the escape of the salt water was necessary to the enjoyment of his well.[9] If he penetrate a stream of clear and another of salt water which mingle and injure another landowner's spring or water well, he has a good defense if he had no knowledge that such spring or well was supplied by the spring of clear water underlying

[5] Forney v. Word, 25 Tex. App. 443; 62 S. W. 108; Cleminger v. Baden Gas Co., 159 Pa. 16; 28 Atl. 293.

[6] § 109. Barnard v. Monongahela Gas Co., 216 Pa. 362; 65 Atl. 801; Kelly v. Ohio Oil Co., 57 Ohio St. 317; 49 N. E. 399; 63 Am. St. 721; 39 L. R. A. 765.

[7] § 108. Barnard v. Monongahela Gas Co., 216 Pa. 362; 35 Atl. 801.

[8] Barnard v. Monongahela Gas Co., 216 Pa. 362; 35 Atl. 801.

[9] Ohio Oil Co. v. Westfall, 43 Ind. App. 661; 88 N. E. 354.

his land, and that when he discovered the salt and fresh streams of water he made use of the means available to him to prevent their water commingling, or by showing that he could not prevent the commingling of the water at a reasonable outlay.[10] The person injured by the commingling of the waters may recover damages by alleging and proving that the act of the owner was malicious, or that the pollution was not necessary to the enjoyment of the well, or that the defendant did not exercise due care to avoid the injury, or that he knew the neighboring water wells were supplied by a stream of clear water underlying his land and further knew that there was a deeper stratum of salt water when penetrated would likely rise and mingle with fresh water, and that such defendant, at a reasonable outlay, could have prevented the commingling of the water, and he failed to use the means available to him therefor, or that the expense of preventing the damage, though large in actual amount, was small in proportion to the gain of the owner of the well.[11]

§ 884. Enjoining well as a nuisance.

The operation of an oil well will not be enjoined unless it be alleged and shown that its operation will endanger the lives of persons other than the operators, or will endanger the plaintiff's property so as to materially lessen its value. Mere apprehension of injury or damages is not sufficient.[12] If the well be situated near a public highway the owner will be liable to a person injured while lawfully using such highway, if he, the owner, fails to exercise due care in drilling or operating it not to inflict injury upon the plaintiff or his property.[13]

[10] Collins v. Chartiers Valley Gas Co., 131 Pa. 143; 18 Atl. 1012.

[11] Ohio Oil Co. v. Westfall, 43 Ind. App. 661; 88 N. E. 354; Pfeiffer v. Brown, 165 Pa. 267; 30 Atl. 844; 44 Am. St. 660; Collins v. Chartiers Valley Gas Co., 131 Pa. 143; 18 Atl. 1012; 6 L. R. A. 280.

[12] § 667. McGregor v. Camden, 47 W. Va. 193; 34 S. E. 936; Pope Bros. v. Bridgewater Gas Co., 52 W. Va. 252; 43 S. E. 87; Tyner v. People's Gas Co., 131 Ind. 599; 31 N. E. 61; Windfall Mfg. Co. v. Patterson, 148 Ind. 414; 47 N. E. 2; 62 Am. St. 532; 37 L. R. A. 38.

[13] Snyder v. Philadelphia, 54 W. Va. 149; 46 S. E. 366; 102 Am. St. 941; 63 L. R. A. 896.

§ 885. Malicious or negligent waste of gas.

A person who is operating in the same field may be enjoined by the owner of a well therein if he maliciously or negligently wastes oil or gas from the common reservoir.[14] And if the owner of a well abandons a well and fails to close it when gas (or even oil) is escaping in large quantities from a reservoir, to the injury of another whose well draws gas (or even oil) from the same reservoir, he is liable in damages, and the measure is the difference at the point where taken between the value of the natural flow and that of the diminished flow directly attributable to the wrong.[15]

§ 886. Reservation of oil or gas.

The vendor of land reserving the oil and gas underlying it is the owner of such oil and gas, and he may lease or convey such oil or gas, and the grantee or lessee will have the right to enter upon the premises and mine therefor, subject only to the royalty or gas rental agreed upon, if any. Such owner, or his grantee or lessee, may enjoin the surface owner from interfering with his right to the legitimate use of the surface for mining and removing such oil or gas.[16] The grantee of the surface cannot prevent, by injunction, the person so reserving the oil or gas, or his grantee or lessee, from entering upon his land and mining the oil or gas reserved; nor can he recover damages because of such entry and mining operations.[17] In an instance of such severance of the surface and

[14] Hague v. Wheeler, 157 Pa. 324; 27 Atl. 714; 37 Am. St. 736; 22 L. R. A. 141; Calor Oil & Gas Co. v. Franzell, 128 Ky. 715; 109 S. W. 328; 33 Ky. L. Rep. 98.

[15] Louisville Gas Co. v. Kentucky Heating Co. (Ky.), 111 S. W. 374; 33 Ky. L. Rep. 912; Talbott v. Southern Oil Co., 60 W. Va. 423; 55 S. E. 1009.

[16] § 344. Porter v. Mack Mfg. Co., 65 W. Va. 636; 64 S. E. 853.

Care must be observed, however, to determine whether or not the oil and gas were actually reserved; for the reservation of "all minerals" under or in the land conveyed is not enough to reserve the oil and gas therein. Detlor v. Holland, 57 Ohio St. 492; 49 N. E. 690; 40 L. R. A. 266; McKinney's Heirs v. Central, etc., Co., 134 Ky. 239; 120 S. W. 314; Silver v. Bush, 213 Pa. 195; 62 Atl. 832; Dunham v. Kirkpatrick, 101 Pa. 36; 47 Am. Rep. 696; Jamison Coal & Coke Co. v. Carnegie Natural Gas Co. (W. Va.), 87 S. E. 451. But see § 343.

[17] Kiser v. McLean, 67 W. Va. 294; 67 S. E. 725; 140 Am. St. 948; Jackson v. Dulaney, 67 W. Va. 309; 67 S. E. 795; Lillibridge v. Lackawanna Coal Co.,

the oil and gas the statute of limitations does not begin to run in favor of the owner of the surface under a claim of possession of the oil and gas thereunder until he, such surface owner, has taken physical possession of the oil and gas.[18] If the surface owner proceeds to mine the oil or gas, the person reserving it, or his grantee or lessee, may maintain a bill in equity to enjoin him.[19] A sale of the land for taxes in which such a reservation has been made, even where it is assessed in the name of the surface owner only, carries title to the oil and gas reserved to the purchaser at such tax sale.[19*] Oil or gas underlying land may be abandoned, and in a suit between conflicting claimants one party may always show the other had abandoned it.[20]

§ 887. Several tracts under one lease.

In Ohio, if the owners of separate tracts of land join in one lease of all of them for a joint or single royalty of the oil or gas rental, the owner of one of such separate tracts may recover from the lessee the royalty or gas rental produced on his tract,[21] and in West Virginia, one of the owners may file a bill in equity against the lessee and the owners of the other tracts to have decreed to him all the royalty of oils, and all the gas rentals, for wells drilled upon his separate tract of land upon showing that there was a contemporaneous oral or

143 Pac. 293; 22 Atl. 1035; 24 Am. St. 544; Chartiers Block Coal Co. v. Mellon, 152 Pa. 286; 25 Atl. 597; 18 L. R. A. 702; 34 Am. St. 645; Murray v. Allred, 100 Tenn. 100; 43 S. W. 355; 66 Am. St. 740; Moore v. Griffin, 72 Kan. 164; 83 Pac. 395.

[18] § 335. Murray v. Allred, 100 Tenn. 100; 43 S. W. 355; 66 Am. St. 740; Delaware, etc., Canal Co. v. Hughes, 183 Pac. 66; 63 Am. St. 743; Kiser v. McLean, 67 W. Va. 725; 67 S. E. 725; 140 Am. St. 948; Plant v. Humphreys, 66 W. Va. 88; 66 S. E. 94.

[19] Westmoreland Nat. Gas Co. v. DeWitt, 130 Pa. 235; 18 Atl. 724; 5 L. R. A. 731; Delaware, etc., Canal Co. v. Hughes, 183 Pa. 66; 63 Am. St. 743.

[19*] Peterson v. Hall, 57 W. Va. 353; 50 S. E. 603. As to taxes, see State v. Low, 46 W. Va. 451; 33 S. E. 271; Sult v. Hochstetter Oil Co., 63 W. Va. 317; 61 S. E. 307; Wallace v. Elm Grove Coal Co., 58 W. Va. 449; 52 S. E. 485; Kiser v. McLean, 67 W. Va. 725; 67 S. E. 725; 140 m. St. 948; Toothman v. Courtney, 62 W. Va. 167; 58 S. E. 915; Barnes v. Bee, 138 Fed. 476; affirmed Bee v. Barnes, 149 Fed. 727; 79 C. C. A. 433.

[20] Garrett v. South Penn Oil Co., 66 W. Va. 587; 66 S. E. 741.

[21] § 262. Northwestern Ohio Nat. Gas Co. v. Ullery, 68 Ohio St. 259; 67 N. E. 494.

written agreement and understanding between them, the lessors, that the royalty should be paid and delivered to the owner of the particular tract from which the oil or gas should be produced.[22] In Pennsylvania, where land covered by one lease was devised in different tracts to several persons, it was held that one of such devisees might recover from the lessee or the other devisees the proportion of the royalties of oil or rentals for gas produced from the other tracts so separately devised, as the acreage of his tract bore to the total acreage covered by the lease, regardless of whether any oil or gas was produced from his separate tract. The decreased rental value of the tract producing gas or oil, by reason of the wells thereon, was charged against the value of the royalty or gas rental produced from the wells on the tract. Each devisee was held entitled to recover such a share of the total royalties or rentals as his share of the land bore to the whole tract covered by the lease, no matter upon which subdivision the wells were located.[23]

§ 888. Enforcing a forfeiture—Court of equity powerless.

"Equity will not enforce a forfeiture. It will not divest a vested estate by enforcing a forfeiture for the breach of a subsequent condition. In such a case the party is left to his legal remedy."[24] In the first case cited it was said: "Affirmative relief against penalties and forfeitures was one of the springs or fountains of equity jurisdiction, and the jurisdiction was very early exercised, and it would be going in the opposite direction, and acting contrary to its essential principles, to affirmatively enforce a forfeiture. The elementary books on equity jurisprudence state the rule as almost an axiom that equity never enforces a penalty or forfeiture."[25]

[22] Rymer v. South Penn. Oil Co., 54 W. Va. 530; 46 S. E. 459.

[23] Wettengel v. Gormley, 160 Pa. 559; 28 Atl. 934; 40 Am. St. 733; Wettengel v. Gormley, 184 Pa. 354; 39 Atl. 57.

[24] Craig v. Hukill, 37 W. Va. 520; 16 S. E. 363; Newton v. Kemper, 66 W. Va. 160; 66 S. E. 102; Headley v. Hoopengarner, 60 W. Va. 626; 55 S. E. 144; Pheasant v. Hanna, 63 W. Va. 613; 60 S. E. 618; Newton v. Kemper, 66 W. Va. 160; 66 S. E. 102.

[25] 2 Story Eq. Jur., § 1319; 1 Pom. Eq. Jur., § 459; Bisp. Eq., § 181; Beach Mod. Eq. Jur., § 1013.

§ 889. Parties to action.

In an action to have the lease forfeited it is usually the owner of the fee that must bring the action; and he is usually the lessor. But the lessor may have sold the leased premises, but reserving to himself his rights as lessor, in which event he and not the owner of the fee must bring the action. Of course, in such an instance the owner of the fee is at the mercy of the lessor, for by his acts or by express agreement he may waive the forfeiture, and thus continue the lease indefinitely, even to the damages of the owner of the fee, who has only himself to blame for having taken a deed to the premises when it is burdened by the lease. All who are jointly interested in the premises must join in the action. Thus in case of a mineral lease which was indivisible, heirs of the lessor, after disposing of a part of the land subject to the lease, brought suit alone to have it cancelled, and it was held that they could not in that way maintain the action, their grantees being necessary parties.[26] And in an action to enjoin a lessee in an oil lease executed by husband and wife, and providing for payment of the royalty to their joint credit, from drilling, because the lease, if properly reformed, would have expired, the wife was held to be a necessary party.[27]

[26] Cochran v. Gulf Refining Co., 139 La. 1010; 72 So. 716.

[27] Coffman v. Hope Natural Gas Co., 74 W. Va. 57; 81 S. E. 575.

A lessor seeking a cancellation of a lease for a breach of implied covenant must come with *clean hands.* Indiana Oil, etc., Co. v. McCrory, 42 Okl. 136; 140 Pac. 610.

CHAPTER XXXV.

LESSEE'S REMEDY.

§ 890. No consideration for lease.
§ 891. Exploration of premises.
§ 892. Right to continue operations after expiration of term of lease.
§ 893. Reservation for farming purposes.
§ 894. Removal of fixtures.
§ 895. Reservation around buildings.
§ 896. Discovery of gas and oil in paying quantities.
§ 897. Forfeiture or payment of rent.—Lessor's option.
§ 898. Forfeiture or payment of rent.—Lessee's option.
§ 899. Surrender of lease.—Lessee purchasing premises.
§ 900. Assignee, when not liable.
§ 901. Remedy of second lessee or the assignee.
§ 902. Lessee's defense in equity for breach of implied covenants.
§ 903. Waiver of forfeiture.
§ 904. Discovery of oil and gas in paying quantities.
§ 905. Forfeiture by abandonment.
§ 906. Relief from a forfeiture.
§ 907. Unlawful extraction of gas and oil in place.
§ 908. Want of mutuality.
§ 909. Mining partnership.
§ 910. Joint or co-owners of leasehold mining property in Pennsylvania.
§ 911. Partition of oil and gas rights.
§ 912. Tenants in common or joint tenants.
§ 913. Dry hole.
§ 914. Payment of rental in bank.
§ 915. Life tenant.
§ 916. Beginning operations.
§ 917. Failure to plug well.
§ 918. Exclusive grant to construct and operate a pipe line.
§ 919. Reservation of oil and gas.
§ 920. Several tracts under one lease.
§ 921. Rival lessee claimants.
§ 922. Specific performance.
§ 923. Necessary parties to settle controversy between rival claimants.
§ 924. Ejectment.

§ 890. No consideration for lease.

If there be no consideration for a gas or oil lease, yet the lessee may enter upon the demised premises before notice of a declaration of forfeiture, or before the lessor has executed a second lease, for the purpose of making the explorations provided for in his lease; and if the lessor permit him to drill a well wherein he discovers oil or gas in paying quantities, he cannot thereafter declare a forfeiture; nor will equity at the suit of either of them cancel the lease on the ground of want of consideration.[1] But if there be a consideration for a lease—even though it be only a nominal one—the lessee may hold the lease during the term upon complying with the other covenants, and the lessor cannot declare a forfeiture because of the smallness of the consideration.[2]

§ 891. Exploration of premises.

The lessee is entitled to the benefit of the term fixed within which to make explorations, upon payment or tender of the rental, according to the stipulations of the lease.[3] If the lessor

[1] § 70. Friend v. Mallory, 52 W. Va. 53; 43 S. E. 114; Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 933; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; 87 Am. St. 1027.

[2] Brown v. Fowler, 55 Ohio St. 507; 63 N. E. 76; Dill v. Fraze, 169 Ind. 53; 79 N. E. 971; Allegheny Oil Co. v. Snyder, 106 Fed. 764; 45 C. C. A. 604; Central Ohio Nat. Gas & Fuel Co. v. Eckert, 70 Ohio St. 127; 71 N. E. 281; Brewster v. Lanyon Zinc Co., 140 Fed. 801; 72 C. C. A. 213.

[3] Smith v. South Penn. Oil Co., 59 W. Va. 204; 53 S. E. 152; Hays v. Forest Oil Co., 213 Pa. 556; 62 Atl. 1072; Van Etten v. Kelly, 66 Ohio St. 605; 64 N. E. 560; Erie Crawford Oil Co. v. Meek, 40 Ind. App. 156; 81 N. E. 518; Snodgrass v. South Penn. Oil Co., 47 W. Va. 509; 35 S. E. 820; Vendocia Oil, etc., Co. v. Robinson, 71 Ohio St. 302; 73 N. E. 222; Glasgow v. Chartiers Oil Co., 152 Pa. 48; 25 Atl. 232; Dill v. Fraze, 165 Ind. 53; 79 N. E. 971; Lowther Oil Co. v. Guffey, 52 W. Va. 88; 43 S. E. 101; Pittsburg, etc., Co. v. Bailey, 76 Kan. 42; 90 Pac. 803; Monarch Oil & Gas Co. v. Richardson, 99 S. W. 686; 30 Ky. L. Rep. 824; Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188; 86 N. E. 219; Great Western Oil Co. v. Carpenter, 43 Tex. Civ. App. 229; 95 S. W. 57; Houssierre-Lattreille Oil Co. v. Jennings-Heywood Oil Syndicate, 115 La. 107; 38 So. 932; Armitage v. Mt. Sterling Oil & Gas Co., 80 S. W. 177; 25 Ky. L. Rep. 2262; Jennings-Heywood Oil Syndicate v. Houssierre-Lattreille Oil Co., 119 La. 864; 44 So. 481; Ringle v. Quigg, 74 Kan. 581; 87 Pa. 724; O'Neill v. Resinger, 77 Kan. 63; 93 Pac. 640; Shaffer v. Marks, 241 Fed. 139; Bloom v. Rugh, 98 Kan. 589; 160 Pac. 1135.

acquiesces in delays in either the payment of the rentals or commencing explorations, he waives the right to forfeit the lease because of such failure, and the lessee may hold the lease, notwithstanding such technical forfeiture.[4] If the lessee be excluded by the lessor from the premises for the purposes of the lease, or he withhold from him the possession for such purposes, the lessee may recover damages in an action of law against the lessor, for in every lease there is an implied covenant of right of entry and quiet enjoyment.[5] If the lessee has developed a well that produces oil or gas in paying quantities, he may enjoin the lessor from drilling other wells upon the leasehold premises or from interfering with him in his right of possession for the purposes of the lease.[6] The lessee may sue anyone who enters upon the demised premises without his consent during the term and takes gas or oil therefrom; and the measure of his damages is the value of the oil or gas taken. But if such person enters under color of title or in good faith, believing he has a right to the oil and gas, the actual cost of production will be deducted and the lessee allowed only the value of the gas or oil less such actual cost. No deduction, however, will be made for drilling dry holes.[7] If a lessee be unlawfully excluded from the leased

[4] § 183. New American Oil Co. v. Troyer, 166 Ind. 402; 76 N. E. 353; Duffield v. Hue, 129 Pa. 94; 18 Atl. 566; Dentley v. Anderson, 94 C. C. A. 647; 169 Fed. 391; Westmoreland, etc., Gas Co. v. DeWitt, 130 Pa. 235; 18 Atl. 724; 5 L. R. A. 731; Campbell v. Rock Oil Co., 151 Fed. 191; 80 C. C. A. 467; Steiner v. Marks, 172 Pa. 400; 33 Atl. 695; Kansas Natural Gas Co. v. Harris, 79 Kan. 167; 100 Pac. 72; Consumers' Gas Trust Co. v. Ink, 163 Ind. 174; 71 N. E. 477; Monarch Oil, etc., Co. v. Richardson, 99 S. W. 668; 30 Ky. L. Rep. 824; Consumers' Gas Trust Co. v. Howard, 163 Ind. 170; 71 N. E. 493; Lynch v. Versailles Fuel, etc., Co., 165 Pa. 518; 30 Atl. 984; Consumers' Gas Trust Co. v. Worth, 163 Ind. 141; 71 N. E. 489; Thompson v. Christy, 138 Pa. 230; 20 Atl. 924; Consumers' Gas Trust Co. v. Littler, 163 Ind. 320; 70 N. E. 363; Hukill v. Myers, 36 W. Va. 639; 15 S. E. 151; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 762; Vendocia Oil, etc., Co. v. Robinson, 71 Ohio St. 302; 73 N. E. 222.

[5] Knotts v. McGregor, 47 W. Va. 566; 37 S. E. 899.

[6] § 110. Westmoreland Gas Co. v. DeWitt, 130 Pa. 235; 18 Atl. 724; 5 L. R. A. 731.

[7] § 115. Backer v. Penn. Lubricating Co., 162 Fed. 627; 89 C. C. A. 419; Doddridge County Oil & Gas Co. v. Smith, 154 Fed. 970; Doddridge County Oil & Gas Co. v. Smith, 173 Fed. 386.

premises, he may maintain an action to recover their possession.[8]

§ 892. Right to continue operations after expiration of term of lease.

If the lease provide a fixed term within which the lessee is given the exclusive right of exploration, and provides that if oil or gas be found in paying quantities within that term the lease shall continue as long thereafter as oil or gas should be produced in paying quantities, the lessee, after discovering oil or gas in paying quantities during the term, may continue operations as long after the term of the lease has expired as it produces oil or gas in paying quantities; and he may defeat the lessor's action for possession or to cancel the lease by proving that he is producing oil or gas in paying quantities, and showing that it is paying him a profit, even a small one, over the operating expenses.[9] If the lessee drill a dry hole within the term, and a second time re-enters for the purpose of drilling another well under inducements and encouragements from the lessor to do so, he may defeat an action of trespass brought by the lessor against him because of such second entry and exploration.[10]

§ 893. Reservation for farming purposes.

If the lessor interfere with the lessee's rights when he has entered and is in possession, such lessee may maintain a bill in equity for an injunction against him if he attempts to drill upon the leased premises and interfere with his exclusive right thereto for mining purposes.[11]

[8] § 130. Barnsdall v. Bradford Gas Co., 225 Pa. 338; 74 Atl. 207.

[9] §§ 148, 149, 151. Long v. Forest Oil Co., 194 Pa. 243; 45 Atl. 121; Kellar v. Craig, 126 Fed. 630; 61 C. C. A. 366; Summerville v. Appollo Gas Co., 207 Pa. 234; 56 Atl. 876; McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027; 28 L. R. A. (N. S.) 959.

[10] § 145. Riddle v. Mellon, 147 Pa. 30; 23 Atl. 241.

[11] § 110. Westmoreland, etc., Gas Co. v. DeWitt, 130 Pa. 235; 18 Atl. 724; 5 L. R. A. 731; Greensboro Nat. Gas Co. v. Fayette County Gas Co., 200 Pa. 388; 49 Atl. 768.

§ 894. Removal of fixtures.

If the lessee enter and discover oil or gas in paying quantities, and then abandon the premises, whereupon the lessor declares a forfeiture and takes possession of the wells, derricks, machinery, casing, and other property, he may recover of him, the lessor, the value of the property so converted, for he had a right to remove it, in an action at law.[12] If the lease give him the right to reserve the fixtures (or even if it do not), and a prior lessee cause the second lease to be cancelled by decree or order of court, and takes possession of the fixtures and converts them to his own use, he will be liable to the second lessee for their value.[13] If the lessee has reserved the right to remove the fixtures within a reasonable time after ceasing operations, and the lessor refuse him permission to do so within that time, and himself takes possession of them, the lessee may recover possession of them by action in replevin or recover their value of him.[14]

§ 895. Reservation around buildings.

The lessee has the right to drill so as to take out the gas under that portion of the premises reserved for buildings, but not upon such part. He cannot open such reservation for the purpose of drilling or storing oil, or the like. If the landowner or anyone else attempts to drill within the reservation, the remedy of the lessee is not by an action in ejectment,[15] but he must bring an action in equity for an injunction.[16] The fact that the lessee may enjoin such proceedings does not prevent his bringing his action at law to recover the damages he has been occasioned thereby. The measure of such damages is the difference in the value of the leasehold before and after

[12] § 217. Cassell v. Crothers, 193 Pa. 359; 44 Atl. 446.

[13] Linden Oil Co. v. Jennings, 207 Pa. 524; 56 Atl. 1074; Perry v. Acme Oil Co., 44 Ind. App. 207; 88 N. E. 859.

[14] Gartlan v. Hickman, 56 W. Va. 75; 49 S. E. 14; 67 L. R. A. 694.

[15] § 97. Duffield v. Hue, 129 Pa. 94; 18 Atl. 566.

[16] Westmoreland, etc., Gas Co. v. DeWitt. 130 Pa. 235; 18 Atl. 724; 5 L. R. A. 731; Lynch v. Burford, 201 Pa. 52; 50 Atl. 228; Consumers' Gas Trust Co. v. American Plate Glass Co. 162 Ind. 392; 68 N. E. 1020; Duffield v. Hue, 136 Pa. 602; 20 Atl. 526; Brown v. Spillman, 155 U. S. 665; 15 Sup. Ct. 245.

the injury, and not the amount of oil or gas taken out of the wells on the reservation by the defendant, nor the amount as fixed by the speculative opinions of the operators as to how much of it might have been obtained through the lessee's wells.[17] In a proceeding for an injunction the court will assess the damages if there be a proper prayer and allegations for their recovery.[18]

§ 896. Discovery of gas or oil in paying quantities.

If gas be discovered in paying quantities, the lessee may hold the premises so long as the stipulated rental is paid, and he, acting in good faith, is the judge as to whether or not the gas is produced in such paying quantities.[19] He may either market the gas and pay the revenue thus produced to the lessor, or he may pay the stipulated rental.[20] If there be no market for the gas, he need make no effort to market it, but may pay the gas rental.[21] On discovering gas in paying quantities the lessee becomes vested with the right to produce it; and if he pays or tenders the stipulated gas rental, and the lessor refuses it and attempts to declare a forfeiture and repossess himself of the premises, a court of equity will enjoin him at the suit of the lessee.[22] If the lessee may pay a rental for delay from year to year, the lessor may give him notice of his intention to declare a forfeiture for failure to develop the premises at the end of the year, but the notice must be given sufficiently long before the expiration of the year in order that he may have a reasonable time to develop

[17] § 115. Duffield v. Rosenzweig, 144 Pa. 520; 23 Atl. 4; Duffield v. Rosenzweig, 150 Pa. 543; 24 Atl. 705.

[18] Allison's Appeal, 77 Pa. 221.

[19] §§ 148, 149, 151. McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027; 28 L. R. A. (N. S.) 959; Eastern Oil Co. v. Coulehan, 65 W. Va. 531; 64 S. E. 836; McKnight v. Manufacturers' Nat. Gas Co., 146 Pa. 185; 23 Atl. 164; 28 Am. St. 790; Summerville v. Appollo Gas Co., 207 Pa. 334; 56 Atl. 876.

[20] Iams v. Carnegie Gas Co., 194 Pa. 72; 45 Atl. 54; Eastern Oil Co. v. Coulehan, 65 W. Va. 531; 64 S. E. 836.

[21] McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027; 28 L. R. A. (N. S.) 959; Westmoreland, etc., Gas Co. v. DeWitt, 130 Pa. 235; 18 Atl. 724; 5 L. R. A. 731; McKnight v. Manufacturers' Nat. Gas Co., 146 Pa. 185; 23 Atl. 164; 28 Am. St. 790.

[22] § 110. Westmoreland, etc., Gas Co. v. DeWitt, 130 Pa. 235; 18 Atl. 724; 5 L. R. A. 731; South Penn. Oil Co. v. Edgell, 48 W. Va. 348; 37 S. E. 596; Eastern Oil Co. v. Coulehan, 65 W. Va. 531; 64 S. E. 836.

them; and if the lessee desires to hold the premises he must develop them within that time.[23] If the lessor is to have free gas for his dwelling or other building, the lessee must furnish it to him, either from the lessor's premises or from other premises, and he may hold the premises so long as he furnishes it, not to exceed the term of the lease.[24] If the lessee desires to terminate the lease because gas is not produced in paying quantities, he may do so by giving the lessor notice before he enters upon another year of his term.[25] If the lessor sue the lessee to recover the stipulated gas rentals he must aver and prove that gas had been discovered in paying quantities; and the fact that the wells were not so producing gas is also a good defense for the lessee.[26]

§ 897. Forfeiture or payment of rent.—Lessor's option.

If a lease provide that it shall be null and void and all rights under it shall determine if a well be not drilled within a time stated or unless the lessee pay a stipulated rental for delay in drilling a well or until one be completed, such lessee may continue the lease in force during the term for which it was given by either paying the rental to the lessor or paying it in bank to his credit, if the lease provide for the latter way of paying the rental.[27] If the lessee be unlawfully deprived of possession of the leased premises, either by the owner or by a second lessee or by a prior lessee holding a void lease, or by a third person, he may recover possession thereof by a promissory action for the purpose of performing

[23] Indiana Nat. Gas Co. v. Leer, 34 Ind. App. 61; 72 N. E. 283; Puritan Oil Co. v. Myers, 39 Ind. App. 695; 80 N. E. 851; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320; 70 N. E. 363; Consumers' Gas Trust Co. v. Ink, 163 Ind. 174; 71 N. E. 477; Consumers' Gas Trust Co. v. Worth, 163 Ind. 141; 71 N. E. 489; Consumers' Gas Trust Co. v. Chrystal Window Glass Co., 163 Ind. 190; 70 N. E. 366.

[24] § 258. Summerville v. Appollo Gas Co., 207 Pa. 334; 56 Atl. 876; Bellevue Oil & Gas Co. v. Pannell, 76 Kan. 785; 92 Pac. 1101.

[25] Double v. Heat & Light Co., 172 Pa. 388; 33 Atl. 694.

[26] Roberts v. Fort Wayne Gas Co., 40 Ind. App. 528; 82 N. E. 558.

[27] Friend v. Mallory, 52 W. Va. 53; 43 S. E. 114; Bettman v. Harness, 42 W. Va. 433; 26 S. E. 271; 36 L. R. A. 566; Yoke v. Snea, 47 W. Va. 40; 34 S. E. 748; Gas Co. v. George, 161 Pa. 47; 28 Atl. 1004.

the covenants of his lease.[28] If the lessor by his conduct clearly indicates that payment will not be exacted when due, and thereby lulls the lessee into a feeling of security and throws him off his guard whereby he does not pay the rental when due, the lessor cannot suddenly, without demand, declare a forfeiture of the lease. Should he attempt to declare one, the lessee may file a bill in equity and obtain relief from the technical forfeiture. In fact, in such an instance, there is no forfeiture.[29] If the lessee has only a mere option to enter and explore, then he must do some act towards the development of the property or pay the rent or commutation money for delay, and in one of these ways exercise his option before the lessor gives notice of his election to revoke and cancel the lease. If he enters upon the premises to develop them, or pays his rental, he is entitled to hold the premises while prosecuting their development, but he must use due diligence in doing so.[30] If he enter and drill a dry hole, and he desires to hold the lease longer, he must drill additional wells within a reasonable time after the completion of the first well; for otherwise it will be considered that he has abandoned it.[31] If the lessee have the right to surrender the lease and thereby escape liability for rent, he may do so and thereby escape all liability for rental accruing after the date of surrender.[32] If

[28] § 130. Guffey v. Hukill, 34 W. Va. 39; 11 S. E. 754; Bartley v. Phillips, 179 Pa. 175; 36 Atl. 217.

[29] § 184. Hukill v. Myers, 36 W. Va. 639; 15 S. E. 151; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 762; Headley v. Hoopengarner, 60 W. Va. 626; 55 S. E. 144; South Penn. Oil Co. v. Edgell, 48 W. Va. 348; 37 S. E. 596; Eastern Oil Co. v. Coulehan, 65 W. Va. 348; 37 S. E. 596.

[30] Lowther Oil Co. v. Miller-Sibley Co., 52 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Cortelyou v. Barnsdall, 236 Ill. 138; 86 N. E. 200; Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 293.

[31] Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107; Stahl v. Vanvleck, 53 Ohio St. 136; 41 N. E. 35; May v. Hazlewood Oil Co., 152 Pa. 518; 25 Atl. 564; Ziegler v. Dailey, 37 Ind. App. 240; 76 N. E. 819; Florence Oil, etc., Co. v. Orman, 19 Colo. 79; 73 Pac. 628; Foster v. Elk Fork Gas Co., 90 Fed. 178; 32 C. C. A. 560; Henne v. South Penn. Oil Co., 52 W. Va. 192; 43 S. E. 147.

[32] § 273. Roberts v. Bettman, 45 W. Va. 143; 30 S. E. 95; Brown v. Fowler, 65 Ohio St. 507; 63 N. E. 76; Bettman v. Shadle, 22 Ind. App. 542; 53 N. E. 662; Marshall v. Oil Co., 198 Pa. 83; 47 Atl. 927; Brewster v. Lanyon Zinc Co., 140 Fed. 801; 72 C. C. A. 213; Poe v. Ulrey, 233 Ill. 56; 84 N. E. 46; Ward v. Tripple State, etc., Co., 131 Ky. 711;

the lessor declare a forfeiture the lessee may defend by alleging that he has performed all the express covenants of the lease, breaches of which are therein declared to be grounds of forfeiture. Where breaches of implied covenants do not constitute a forfeiture, such a defense will defeat the lessor's action to have a forfeiture declared of record to cancel the lease or to recover possession from the lessee.[33]

§ 898. Forfeiture or payment of rent.—Lessee's option.

If the lessee have the option to delay development by payment of a fixed rental at specified times, and there be no express covenant to drill or pay rental for delay, he may usually delay developments within the term by paying the rental during such term.[34] If the lessee has paid or tendered the stipulated rental, or paid it in bank as the leases provide, he may invoke the act of a court of equity and obtain the cancellation of a second lease the lessor has made, claiming there was a forfeiture, and may enjoin all interference by the second lessee with his right to the full enjoyment of the leased premises for the purposes of the lease.[35]

§ 899. Surrender of lease.—Lessee purchasing premises.

If a lease be executed without any consideration for it, and the lessee enters upon it, and develops the premises, he then

Tripple State, etc., Co., 131 Ky. 711; 115 S. W. 819; Roberts v. McFadden, 32 Tex. Civ. App. 47; 74 S. W. 105; Houssierre-Lattreille Oil Co. v. Jennings-Heywood Oil Syndicate, 115 La. 107; 38 So. 932.

[33] Core v. Petroleum Co., 52 W. Va. 276; 43 S. E. 128; Freeland v. South Penn. Oil Co., 189 Pa. 54; 41 Atl. 1000; Marshall v. Oil Co., 198 Pa. 83; 47 Atl. 927; Crawford v. Bellevue, etc., Gas Co., 188 Pa. 233; 38 Atl. 595; Ahrns v. Gas Co., 188 Pa. 249; 38 Atl. 595; Harris v. Ohio Oil Co., 57 Ohio St. 118; 48 N. E. 502.

[34] Smith v. South Penn. Oil Co., 59 W. Va. 204; 53 S. E. 152; Hays v. Forest Oil Co., 213 Pa. 556; 62 Atl. 1072; Erie Crawford Oil Co. v. Meek, 40 Ind. App. 156; 81 N. E. 518; Vendocia Oil, etc., Co. v. Robinson, 71 Ohio St. 302; 73 N. E. 222; 104 Am. St. 773; Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188; 86 N. E. 219; Ringle v. Quigg, 74 Kan. 581; 87 Pac. 724; Monarch Oil, etc., Co. v. Richardson, 99 S. W. 686; 30 Ky. L. Rep. 824; Jennings-Heywood Oil Syndicate v. Houssierre-Lattreille Oil Co., 119 La. 864; 44 So. 481; Shaffer v. Marks, 241 Fed. 139; Brown v. Wilson (Okl.), 160 Pac. 94.

[35] Gillespie v. Fulton Oil Co., 236 Ill. 188; 86 N. E. 219; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 620.

has the right to hold the lease according to its conditions; and the lessor cannot then declare a forfeiture, even though the lease contain a clause giving the lessee the right to surrender the lease at any time and be relieved of all liabilities therein.[36] If he may surrender the premises, but he pay the stipulated rental, he may hold the premises for the period covered by such rental;[37] and the lessor, having received the rental, although normal, cannot during the time for which the rental was paid, declare a forfeiture; for there is a sufficient consideration to support the surrender clause. Under such a lease the lessee has the right to develop the premises or pay the rental for the delay, but not for a longer time than the term for which the lease was given.[38] The lessee must surrender the lease in the manner provided in it; and if recorded, he must execute and acknowledge such surrender of record. The surrender does not affect the right of the lessor to recover rentals that accrued prior to the date of surrender.[39] If the lessee accept a new lease from the owner of the land, the first lease is thereby cancelled.[40] This is also true if he takes a new lease of the reversioner. If the lessee has the right to purchase the premises under an option given in the lease, and he exercises his option, his act will put an end to the lease, if accompanied by a tender of the purchase money.[41]

[36] Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 293; Henne v. South Penn. Oil Co., 52 W. Va. 192; 43 S. E. 147; Lowther Oil Co. v. Miller-Sibley Co., 52 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027.

[37] Friend v. Mallory, 52 W. Va. 53; 43 S. E. 114.

[38] Brown v. Ohio Oil Co., 65 Ohio St. 507; 63 N. E. 76; Houssierre-Lattreille Oil Co. v. Jennings-Heywood Oil Syndicate, 115 La. 107; 38 So. 932; Friend v. Mallory, 52 W. Va. 53; 43 S. E. 114; Brewster v. Lanyon Zinc Co., 140 Fed. 801; 72 C. C. A. 213; Poe v. Ulrey, 213 Ill. 56; 84 N. E. 46; Marshall v. Oil Co., 198 Pa. 83; 47 Atl. 927.

[39] Bettman v. Shadle, 22 Ind. App. 542; 53 N. E. 662; Ward v. Tripple State Gas Co., 131 Ky. 711; 115 S. W. 819; Roberts v. Bettman, 45 W. Va. 143; 30 S. E. 95.

[40] § 269. Wade v. South Penn. Oil Co., 45 W. Va. 380; 32 S. E. 169; Auer v. Penn, 92 Pa. 444; Carnegie Nat. Gas Co. v. Philadelphia Co., 158 Pa. 317; 27 Atl. 95; Edwards v. Hale, 37 W. Va. 193; 16 S. E. 587.

[41] Wade v. South Penn. Oil Co., 45 W. V. 380; 32 S. E. 169; Swearingen v. Watson, 35 W. Va. 463; 14 S. E. 249.

§ 900. Assignee, when not liable.

If the lease has expired before it is assigned, and the assignee does not take possession of the leased premises, he will not be bound by any of the covenants in the lease.[42] If sued for a breach of the covenants of the lease he may show that such breach occurred before the assignment, or after he parted with the lease.[43] Indeed, the lessor has the burden in the former instance to show that the breach occurred after the assignment; but in the latter instance the defendant assignee has the burden to show that it occurred after he had assigned it, unless the complaint shows that fact. If the lessor seeks to enforce claims arising out of facts suppressed when the lease was made; or he seeks to recover from the lessee a bonus provided for in the lease, the receipt of which was acknowledged in the lease, the lessee may defeat such claims or the recovery of the bonus by showing that he took it for value, in good faith, and without any knowledge of such claims or that the bonus had not been paid.[44]

§ 901. Remedy of second lessee or the assignee.

An assignee, if he have notice of a prior lease, must make diligent inquiry not only as to its conditions, but also as to whether or not its conditions have been performed. If there be specifications for forfeiture set forth in the lease, he must inquire whether or not the lessor has elected to declare a forfeiture; and if he fail to make such inquiry he takes the risk of all equities existing in favor of the lessor which diligent inquiry would have disclosed. In an instance of a second lessee he is held to the same duty, if he expects to take the lease free of the first lease.[45]

[42] Chaney v. Ohio & Indiana Oil Co., 32 Ind. App. 193; 69 N. E. 477.

[43] § 233. Washington Nat. Gas Co. v. Johnson, 123 Pa. 576; 16 Atl. 799.

[44] Moore v. Sawyer, 167 Fed. 826.

[45] Bartley v. Phillips, 179 Pa. 175; 36 Atl. 217; Compton v. People's Gas Co., 75 Kan. 572; 89 Pac. 1029; 10 L. R. A. (N. S.) 758; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 762; Hicks v. Gas Co., 207 Pa. 570; 57 Atl. 55; Carnegie Natural Gas Co. v. Philadelphia Co., 158 Pa. 317; 27 Atl. 95.

§ 902. Lessee's defense in equity for breach of implied covenants.

If a lessor sue in equity to cancel the lease for failure to develop or protect lives, or for its specific performance, the lessee may allege and prove that his management of the premises is founded upon good, honest business judgment, that whether or not additional wells should be drilled is a question of opinion, and doubtful if they would be profitable. If his management be founded upon good, honest judgment, and there be no fraud, a court of equity, after the lessee has developed gas or oil in paying quantities and is operating the wells and delivering the royalties or paying the gas rental, will not secure a forfeiture and cancellation of the lease, nor its specific performance.[46]

§ 903. Waiver of forfeiture.

In an action to cancel a lease because of its forfeiture, or to recover damages because of such forfeiture, the lessee may always show that the lessor waived the forfeiture, or upon a consideration forgave it; or by his conduct, where the action is to cancel it, led him to believe that a forfeiture by reason of the delay would not be enforced.[47]

[46] § 212. Harness v. Eastern Oil Co., 49 W. Va. 232; 38 S. E. 662; Doddridge County Oil Co. v. Smith, 154 Fed. 970; Ammons v. South Penn. Oil Co., 47 W. Va. 610; 35 S. E. 1004; McGraw Oil Co. v. Kennedy, 65 W. Va. 599; 64 S. E. 1027; 28 L. R. A. (N. S.) 959; Young v. Forest Oil Co., 194 Pa. 243; 45 Atl. 121; Kellar v. Craig, 126 Fed. 630; 61 C. C. A. 366; Colgan v. Forest Oil Co., 194 Pa. 234; 45 Atl. 119; 75 Am. St. 695.

[47] §§ 183, 184. Duffield v. Hue, 129 Pa. 94; 18 Atl. 566; Westmoreland, etc., Co. v. DeWitt, 130 Pa. 235; 18 Atl. 724; 5 L. R. A. 721; Steiner v. Marks, 172 Pa. 400; 38 Atl. 695; Lynch v. Versailles Fuel Gas Co., 165 Pa. 518; 30 Atl. 984; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320; 72 N. E. 360; Consumers' Gas Trust Co. v. Ink, 163 Ind. 174; 71 N. E. 477; Consumers' Gas Trust Co. v. Worth, 163 Ind. 141; 71 N. E. 489; Consumers' Gas Trust Co. v. Howard, 163 Ind. 170; 71 N. E. 493; Hukill v. Myers, 36 W. Va. 639; 15 S. E. 151; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 762; Vendocia Oil, etc., Co. v. Robinson, 71 Ohio St. 302; 73 N. E. 222; Campbell v. Rock Oil Co., 151 Fed. 191; 80 C. C. A. 467; Duntley v. Anderson, 169 Fed. 391; 94 C. C. A. 647; Kansas Natural Gas Co. v. Harris, 79 Kan. 167; 100 Pac. 7.

§ 904. Discovery of oil and gas in paying quantities.

As a rule the lessee is the judge of whether or not the oil or gas has been discovered in paying quantities, if his judgment is exercised in good faith. If found, the lessee must go on and operate the property so as to make it of benefit both to himself and the lessor. In order to hold the lease, the lessee need not show that he has discovered oil or gas in sufficient quantities to repay him the cost of development; but it is sufficient to show that it is being produced at a profit on the cost of production. If the lessee can show that he is producing oil or gas at a profit on the cost of production he will thereby defeat the lessor's action to cancel the lease on the ground that neither oil nor gas has been discovered and is being produced in "paying quantities."[48] If on discovering gas he cannot market it at a profit, he may close the well and pay the rental and hold the lease beyond the fixed term; and in an action to compel him to put down more wells he may show the lack of a profitable market for it; and in determining whether the gas could be profitably marketed the distance to the market, the expense of marketing, and every circumstance of a similar kind may be shown by him.[49] Merely because a lessee, contrary to the opinion of the lessor believes it inexpedient to further develop the leased premises, and fails to make further development, will not entitle the lessor to divest him of the right he has already acquired in the property, where he has not been guilty of fraud or bad faith.[49a]

§ 905. Forfeiture by abandonment.

If a lease does not contain a clause of forfeiture, the mere failure to pay the rental does not constitute an abandonment

[48] § 148. Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Young v. Forest Oil Co., 194 Pa. 243; 45 Atl. 1021.

[49] Iams v. Carnegie Natural Gas Co., 194 Pa. 72; 45 Atl. 54; McKnight v. Manufacturers' Nat. Gas Co., 146 Pa. 185; 23 Atl. 164; 28 Am. St. 790; Colgan v. Forest Oil Co., 194 Pa. 234; 45 Atl. 119; 75 Am. St. 695; Young v. Forest Oil Co., 194 Pa. 243; 45 Atl. 1021; Manhattan Oil Co. v. Carrell, 164 Ind. 526; 73 N. E. 1084.

[49a] Caddo Oil & Mining Co. v. Producers' Oil Co., 134 La. 701; 64 So. 684.

nor authorize a court of equity to cancel the lease; and, if the lessor bring an action to cancel the lease for failure to pay the rental, the lessee may show his willingness to perform the covenants of the lease and that the explorations had not been unreasonably delayed.[50] If he has entered the premises and explored them unsuccessfully, he may re-enter within a reasonable time after he has ceased operations and defeat the lessor's proceedings to cancel the lease by proving he did not intend to abandon such premises.[51] If gas or oil has been developed in paying quantities, then, in order to establish an abandonment of the premises by him it must be shown that he had intentionally abandoned them, had relinquished his possession thereof. The relinquishment must be actual, and the abandonment intentional. These are questions of fact that the plaintiff-lessor must show.[52] The forfeiture of the lease does not affect the right of the lessee to convey oil or gas in pipes across the demised premises from other premises under an agreement in the lease giving him the right to convey it across them.[53] If the lessee be prevented by the lessor from taking possession of the leased premises, it will not be held that he forfeited his rights; and this is especially so if he in good faith commenced operations preparatory to drill a well upon them within the time the lease required him to begin operations.[54]

§ 906. Relief from a forfeiture.

If the dealings between the lessor and lessee be such as to lead the latter to believe the former would not demand a strict performance of the covenant for the payment of the

[50] § 155. Pheasant v. Hanna, 63 W. Va. 317; 60 S. E. 618; Marshall v. Oil Co., 198 Pa. 83; 47 Atl. 927.

[51] § 161. Henne v. South Penn. Oil Co., 52 W. Va. 192; 43 S. E. 147; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027.

[52] Henne v. South Penn. Oil Co., 52 W. Va. 192; 43 S. E. 147; McMillan v. Titus, 222 Pa. 500; 72 Atl. 240; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Shank v. Stahl, 35 Ind. App. 443; 74 N. E. 538; Garrett v. South Penn. Oil Co., 66 W. Va. 587; 66 S. E. 741.

[53] Stage v. Boyer, 183 Pa. 560; 38 Atl. 1035.

[54] Henderson v. Ferrell, 183 Pa. 547; 38 Atl. 1018.

land rental or commutation money; or if defects have been discovered in the lessor's title to the land which will endanger the lessee's right under the lease to the oil or gas, a failure to pay such rental or commutation money at the time specified in the lease will be only a technical forfeiture, and the lessee may maintain a bill in equity for relief against such forfeiture.[55] And where the first lessee brought an action against a second lessee, with notice, to enjoin the operations of the latter under his lease, and to obtain a discovery and an accounting in respect of oil and gas produced and sold in the course of operations already had, in the Federal court, it was held that the court would give relief according to the rules in equity in force in the Federal courts, would refuse to follow the decisions of the State courts to the effect that the first lessee was not entitled to relief because of the surrender clause in his lease; and that delay by the first lessor in making the first payments of rent was not ground for refusing equitable relief to the plaintiff by way of enjoining operations under the second lease and a granting of a discovery and accounting in respect to that and gas already produced, where the rental was not in arrear when the second lease was given; and there had been no attempt at any time to forfeit or put an end to the lease because of the omissions to pay strictly in advance.[55a]

§ 907. Unlawful extraction of gas or oil in place.

If the lessee develop the leased premises he becomes vested with the exclusive right of producing the gas or oil discovered, and may maintain a bill in equity for an injunction against either the lessor or any persons claiming through him if he or they attempt to drill upon the leasehold premises.[56]

[55] § 213. Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 762; South Penn. Oil Co. v. Edgell, 48 W. Va. 348; 37 S. E. 596; Hukill v. Myers 36 W. Va. 639; 15 S. E. 151; Eastern Oil Co. v. Coulehan, 65 W. Va. 531; 64 S. E. 836; Headley v. Hoopengarner, 60 W. Va. 626; 55 S. E. 144; Bloom v. Rugh, 98 Kan. 589; 160 Pac. 1135; Smith v. People Nat. Gas Co. (Pa.), 101 Atl. 739; Oil Creek R. R. Co. v. Atlantic & G. W., 57 Pa. St. 65; Downey v. Gooch, 240 Fed. 527.

[55a] Guffey v. Smith, 237 U. S. 101; 35 Sup. Ct. 526; 59 L. Ed. 855, reversing 202 Fed. 106; 120 C. C. A. 436. See a similar case in Downey v. Gooch, 240 Fed. 527.

[56] Westmoreland, etc., Gas Co. v.

If a tenant for life or years grant the lease the lessee will not be liable for the rental or commutation money; for such lessor had no right to give the lease.[57]

§ 908. Want of mutuality.

If the lease be void for want of mutuality, or if it be incapable of specific performance by reason of its terms being either unfair, unconscionable or unjust, the lessee must enter and explore to entitle him to hold the lease against the lessor or his assigns. If the lessor permit the lessee to incur expenses in developing the premises, he will not be allowed subsequently to declare a forfeiture; nor can he secure its cancellation on the ground of a want of mutuality or unfairness.[58] If the lessee has paid a valuable, even though nominal, consideration for the lease, and has, under its terms, a fixed time within which to enter and commence operations or pay commutation money, he may hold the lease, notwithstanding its terms may be unfair or unjust, by entering and developing them or paying the stipulated rental during the term.[59]

§ 909. Mining partnerships.

The owners of the major part of an oil and gas lease have the right to control and manage it; and if they exercise their judgment fairly and honestly the court will not inquire into their management at the instance of the owners of the minor part.[60] One partner may file a bill in equity charging mismanagement by his partners in control, or fraudulent conduct

DeWitt, 130 Pa. 325; 18 Atl. 724; 5 L. R. A. 731; Duffield v. Hue, 136 Pa. 602; 20 Atl. 526.

[57] § 298. Marshall v. Mellon, 179 Pa. 371; 36 Atl. 201; 35 L. R. A. 216.

[58] Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Boyd v. Brown, 47 W. Va. 238; 38 S. E. 668; Harness v. Eastern Oil Co., 49 W. Va. 232; 38 S. E. 662.

[59] Brewster v. Lanyon Zinc Co., 140 Fed. 801; 72 C. C. A. 213; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 762; Poe v. Ulrey, 233 Ill. 56; 84 N. E. 46; Pittsburg Vitrified, etc., Co. v. Bailey, 76 Kan. 42; 90 Pac. 803.

[60] §362. Blackmar v. Williamson, 57 W. Va. 249; 50 S. E. 254; Bartlett v. Boyles, 66 W. Va. 327; 66 S. E. 474.

on their part to his injury, or that the business is being conducted at a loss, or alleging grounds for a dissolution; and upon proof of the allegations the court will dissolve the partnership, order an accounting, and decree a sale of the partnership property.[61] If one partner had advanced money for the conduct of the partnership business, he has a lien to the extent of the money advanced on the partnership property, and may file a bill in equity against his co-partners for an accounting and dissolution and sale of such partnership property, and obtain a decree over against them for any balance remaining after exhausting the partnership assets.[62] If the partners divide the partnership property or production of the business, whatever lien one partner may have had for advances made over and above his just proportion is lost; and the execution among the partners of "division orders" whereby the share of each partner is set apart in the pipe lines to each one of them is such a severance as precludes a partner who has made an advance claiming a lien against the production so divided.[63] One partner may sell his interest in the mining partnership which will vest in the purchaser the vendor's interest, but the sale will not dissolve the partnership nor discharge the interest sold from any lien that may be thereon in favor of the other partners who may have made advances beyond their just proportion. The purchaser also takes such interest subject to the rights of third persons who have furnished supplies to the partners, and the other partners can maintain a bill in equity for a dissolution and sale of the property without regard to such sale.[64] Anyone furnishing supplies to the partnership may recover a judgment against all of them without showing a special contract or express agreement amongst the partners to become part-

[61] Childers v. Neely, 47 W. Va. 70; 34 S. E. 828; 81 Am. St. 777; 49 L. R. A. 468; Blackmaer v. Williamson, 57 W. Va. 249; 50 S. E. 254.

[62] § 364. Bartlett v. Boyles, 66 W. Va. 327; 66 S. E. 474; Kirchner v. Smith, 61 W. Va. 434; 58 S. E. 614; Greenlee v. Steelsmith, 64 W. Va. 353; 62 S. E. 459.

[63] Childers v. Neely, 47 W. Va. 70; 34 S. E. 628; 81 Am. St. 777; 49 L. R. A. 468; Bartlett v. Boyles, 66 W. Va. 327; 66 S. E. 474; Greenlee v. Steelsmith, 64 W. Va. 353; 62 S. E. 459.

[64] § 356. Greenlee v. Steelsmith, 64 W. Va. 353; 62 S. E. 459.

ners or to share the profits and losses of the mining adventure. It is sufficient merely to show that the defendants had united in the development of the lease or operation of the well thereon, while the relation of mining partners arises from the ownership of shares or interest in the lease, and the working of the premises for the purpose of taking out oil or gas, yet as actual working of the premises is essential and necessary to charge the owners as a mining partnership, for otherwise the owners if they are simply tenants in common or co-owners.[65] If a suit be brought to recover the price of supplies furnished the mining partnership, any one of the partners may defeat the plaintiff by showing that they were not necessary and were unusual in the transaction of the particular business; and if it be to recover for money borrowed, he may defeat the action by showing that the person borrowing the money on behalf of the partnership had no authority to borrow it or to execute the note or accept the bill of exchange given to secure its payment.[66] If the members are discordant, at ill-will, and the partnership is hopeless of prosperity, one of the partners may secure its dissolution, an accounting and appointment of a receiver by filing a bill in equity for that purpose.[67]

§ 910. Joint or co-owners of leasehold mining property in Pennsylvania.

In Pennsylvania joint or co-owners of mining property or an oil or gas leasehold are tenants in common when engaged in the development of the common property, and they cannot be charged as partners in the absence of proof of a contract for a partnership; but as to third persons they may subject

[65] Childers v. Neely, 47 W. Va. 70; 34 S. E. 828; 81 Am. St. 777; 49 L. R. A. 468; Kirchner v. Smith, 61 W. Va. 436; 58 S. E. 614; Jones v. Clark, 42 Cal. 425; Duryea v. Burt, 28 Cal. 569; Taylor v. Castle, 42 Cal. 367; Settenbree v. Putnam, 42 Cal. 490; Decker v. Howell, 42 Cal. 636.

[66] § 363. Childers v. Neely, 47 W. Va. 70; 34 S. E. 828; 81 Am. St. 777; 49 L. R. A. 468; Waldron v. Hughes, 44 W. Va. 126; 29 S. E. 505; Charles v. Eshleman, 5 Colo. 107; Judge v. Broswell, 13 Bush. 67; McConnell v. Denver, 35 Cal. 365; Congdon v. Olds, 18 Mont. 487; 46 Pac. 261; Manville v. Parks, 7 Colo. 128; 2 Pac. 212; Jones v. Clark, 42 Cal. 181.

[67] Childers v. Neely, 47 W. Va. 70; 34 S. E. 828; 81 Am. St. 777; 49 L. R. A. 468.

themselves to liability as partners by a course of dealings or by their acts and declarations. As to each other their relation is fixed by their title until by agreement they change it.[68] One of the owners, even while engaged in developing or operating the lease, may convey his undivided interest, and the purchaser will take the interest conveyed clear of any claim for advances made by the co-owners or tenants in common. Neither the partner selling, the purchaser, nor the interest purchased will be held liable for advances made by such co-owners.[69] One owner may maintain a bill in equity against the other owners for an accounting where they have kept the accounts pertaining to the lease, purchased the supplies, paid the bills and furnished the plaintiff statements from time to time, deducting his proportion of the expenses.[70] If a joint owner has been fraudulently deprived by his co-tenants of his interest in the oil leasehold, he may bring an action for his share of the oil produced and converted by the other tenants while in possession, and recover as his damages the value of the oil in the pipes and tanks, without any deduction for the expenses of production.[71] Where all the co-tenants of an oil lease except one assigned the lease to one operator who was to deliver to them a part of the product, and the one who did not join notified the assignee not to deliver any oil to his co-tenants, it was held that he, not having joined in the assignment, was not entitled to his share of the oil without proving that his co-tenants had received more than their share; that if he chose to affirm the assignment, he must take his share with the others upon a distribution of the royalty after deducting all proper charges and expenses; and that if he did not affirm the lease, he had no claim to any share in the royalty, and could only look to the lessee as a co-tenant who had not acquired his title. If a co-tenant desires to recover his proportion of the royalty, he must first notify the assignee when his remedy will be

[68] § 357. Butler Savings Bank v. Osborne, 159 Pa. 10; 28 Atl. 163; 39 Am. St. 665; Neill v. Shamburg, 158 Pa. 263; 27 Atl. 992; Walker v. Tupper, 152 Pa. 1; 25 Atl. 172.

[69] Dunham v. Loverock, 158 Pa. 197; 27 Atl. 990; 38 Am. St. 838.

[70] Harrington Bros. v. Florence Oil Co., 178 Pa. 444; 35 Atl. 855.

[71] Foster v. Weaver, 118 Pa. 42; 12 Atl. 213.

against the assignee who has not acquired his title. If he desires to share in the royalty, in an action against his co-tenants, he must show that they had received more than their share of the royalty. All proper charges and expenses will be first deducted from the royalty before he will be entitled to anything.[72] If lessees are tenants in common in the lease but partners in the machinery and appliances for developing the oil and gas, and in the business of mining and selling the oil and gas, and are engaged in the development of the leasehold premises and also in the marketing of the oil and gas, and have expended money upon the enterprise, any one of them may maintain a bill of equity against his partners for a discovery and for a settlement of the accounts of the expenses, receipts and disbursements incident to the business.[73]

§ 911. Partition of oil and gas rights.

One co-owner of an oil or gas lease cannot maintain a suit for partition in kind against the other co-owner.[74] If one desires a division his remedy is by a bill in equity for a sale of the whole oil or gas interest, and division of the proceeds. A decree cannot be entered partitioning the mining rights and interests in kind.[75]

§ 912. Tenants in common or joint tenants.

If a lessee has agreed to pay a stipulated royalty and the landowner before the execution of the lease has conveyed away an interest in the oil and gas equal to one-half or one-third of the agreed royalty, he cannot be required to pay more than the royalty stipulated in the lease; for such lease implies a covenant of general warranty.[76] If he acquire a

[72] Enterprise Oil & Gas Co. v. National Transit Co., 172 Pa. 421; 33 Atl. 687.

[73] Johnson v. Price, 172 Pa. 427; 33 Atl. 688.

[74] § 315. Beardsley v. Kansas Nat. Gas Co., 78 Kan. 571; 96 Pac. 589; Waterford Oil & Gas Co. v. Shipman, 233 Ill. 9; 84 N. E. 53; Ziegler v. Brenneman, 237 Ill. 15; 86 N. E. 597; Emery v. League, 31 Tex. App. 474; 72 S. W. 603.

[75] Hall v. Vernon, 47 W. Va. 295; 34 S. E. 764; 49 L. R. A. 464; Preston v. White, 57 W. Va. 278; 50 S. E. 236.

[76] Kilcoyne v. Southern Oil Co., 61 W. Va. 538; 55 S. E. 888.

lease of land from a joint tenant or tenant in common, he may maintain a bill in equity to enjoin operations on the demised premises by a person holding a lease which is either void for want of mutuality or unconscionable, although signed by all the co-owners.[77] But where one tenant executes a lease for the whole tract, and his co-owners are minors whose interests are sold under a proceeding taken in court for that purpose, and the purchaser, as a consideration for the lease, agrees to pay the stipulated royalty, he will be required to pay the royalty agreed upon as a consideration for his purchase.[78] As the execution of a lease by one tenant for the whole premises implies a covenant of general warranty, the lessee may maintain a bill in equity to cancel a subsequent lease made by the same lessor to another person while he and the lessee were endeavoring to acquire the interests of the other tenants.[79] A lessee of one tenant is not entitled to a partition of the lands, but is entitled as against his lessor to possession for the purpose of operating the premises; and while he cannot lawfully extract oil and gas, yet if he does extract it he will be required to account to the co-owners, who did not join in the lease, for their part of the production.[80] If the lease be executed by the co-owners jointly, the lessee may pay the rent or royalty to any one of them, and his receipt will be binding on the others. But if one of them notify him he intends to collect and receive his proportion of the rent or royalty separately, then the lessee must pay him his proportion accruing under the lease after the receipt of the notice.[81] If part of the joint tenants or tenants in common are minors, the adult tenant may declare a forfeiture of the lease for non-development of the premises or non-payment of the rent, and if the forfeiture is not against the interests of the minors it will terminate the lease; but if the co-tenants bring suit to recover the rentals accruing subse-

[77] §§ 316, 317. Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. 933.

[78] Headley v. Hoopengarner, 60 W. Va. 626; 55 S. E. 144.

[79] Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 620.

[80] Waterford Oil & Gas Co. v. Shipman, 233 Ill. 9; 84 N. E. 53; Compton v. People's Gas Co., 75 Kan. 572; 89 Pac. 1029; 10 L. R. A. (N. S.) 758; Ziegler v. Brenneman, 237 Ill. 15; 86 N. E. 597.

[81] § 325. Swint v. McCalmont Oil Co., 184 Pa. 202; 38 Atl. 1020.

quently to the declaration of forfeiture, the lessee may defeat them by alleging and proving the declaration of the forfeiture; and that he accepted it as a final determination of the lease, and thereafter neither paid the rentals nor attempted to make any explanation.[82] If one tenant lease the entire land held in joint or common tenancy, the other tenants may ratify the lease, and in a suit in equity for an accounting of the rents and royalties they will be entitled to an accounting of all money received by the lessor by way of bonus money, commutation money, royalty or gas rentals accruing under the lease.[83]

§ 913. Dry hole.

If the lessee drill a well which turns out to be a non-productive one, that does not necessarily terminate his lease; for he may, within a reasonable time either make additional explorations, or pay commutation or land rental money for delay, if the lease provide for such payment. If the lessor refuse to permit him to continue the developments within a reasonable time, or refuse to receive the commutation or rental money for delay, he may, if excluded from the premises by him, recover possession of them in a possessary action, or may enjoin him, or any other person, from any interference in making further developments.[84] If he has abandoned the premises, and neither made further explorations nor paid commutation or rental money, that fact is a good defense in an action to recover rental or commutation money accruing subsequent to the abandonment, but he must allege and show that he had dug a test well which was non-productive, that he had abandoned the premises and notified the lessor or that he had knowledge of the abandonment before the rentals had accrued.[85]

[82] Wilson v. Goldstein, 152 Pa. 524; 25 Atl. 493; Heinauer v. Jones, 159 Pa. 228; 28 Atl. 228.

[83] Sommers v. Bennett, 68 W. Va. 157; 69 S. E. 690.

[84] § 159. Henne v. South Penn. Oil Co., 52 W. Va. 192; 43 S. E. 147; Stahl v. Van Vleck, 53 Ohio St. 136; 41 N. E. 35; Bartley v. Phillips, 179 Pa. 175; 36 Atl. 217.

[85] May v. Hazlewood Oil Co., 152 Pa. 518; 25 Atl. 564.

§ 914. Payment of rental in bank.

If the lease provide for payment of the rentals in a designated bank, the lessee may deposit them there to the credit of the lessor, and that will continue the lease even though he has refused to accept them when tendered to him personally or refuses to draw them from the bank. If he executes a second lease before the maturity of the rentals under the first lease, the lessee may still make the deposit without making a personal tender to him.[86] Unless the lease provide expressly for it, the rent need not be paid in advance, but it may be paid at any time before the end of the period designated, and upon such payment (or deposit in bank, when the lease so provides), the lease is extended to the end of the next period provided for by it during which it may be kept alive by the payment of rental or commutation money.[87] If the rental or commutation be made payable under the lease in bank, then the lessor may refuse to accept the money when tendered to him in person; and the lessee must then pay it into the bank; for the parties having fixed the place and manner of payment by agreement, the money must be paid as thus provided. An acceptance by the lessor of the money when tendered him is a waiver of the right to have it deposited in bank to his credit. If the bank refuse to accept the money when tendered, yet the tender will be good if the lessee stands ready to pay the lessor the money whenever requested by it or by the lessor or his authorized agent. But as a matter of precaution the lessee should notify the lessor of the bank's refusal and express a willingness to pay it to him in person or in any other bank in the vicinity. The fact that the lessee has on deposit money in the bank where the payment is to be made will not serve as a tender of the rental or commutation

[86] Indiana, etc., Gas & Oil Co. v. Beale, 166 Ind. 684; 76 N. E. 520; Lafayette Gas Co. v. Kelsey, 164 Ind. 563; 74 N. E. 7; Sayers v. Kent, 201 Pa. 38; 50 Atl. 296; American Window Glass Co. v. Indiana, etc., Gas Co., 37 Ind. App. 439; 76 N. E. 1006; Yohe v. Shea, 47 W. Va. 401; 34 S. E. 748; Rhodes v. Mound City Gas & Oil Co., 80 Kan. 762; 104 Pac. 851; Friend v. Mallory, 52 W. Va. 53; 43 S. E. 114; Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188; 86 N. E. 219; Montfort v. Lanyon Zinc Co., 67 Kan. 310; 72 Pac. 78.

[87] Rhodes v. Mound City Gas & Oil Co., 80 Kan. 762; 104 Pac. 851; Blodgett v. Lanyon Zinc Co., 120 Fed. 893; 58 C. C. A. 79; Rose v. Lanyon Zinc Co., 68 Kan. 126; 74 Pac. 625.

money unless he in some way direct the bank to credit the lessor's account with the amount due him; for without such direction, or a check payable to the lessor, the bank has no power to appropriate his money to the credit of the lessor; but if it should unauthorizedly do so, he may ratify its act.

§ 915. Life tenant.

If a lessee take a lease from a life tenant he may defeat any action brought to enforce its covenants by alleging and proving that the plaintiff (or his grantee) has only a life estate in the property leased, and that the remainderman has not joined therein.[88]

§ 916. Beginning operations.

Operations begun by the lessee for development on the last day specified for their beginning will prevent a forfeiture for not beginning development proceedings, and is a defense when an action is brought for declaring a forfeiture on the ground that they were not begun within the time specified.[89]

§ 917. Failure to plug well.

If a lessee abandon the premises he must close any gas well he has drilled so that the gas will not escape, to the injury of the landowners; and if he do not he will be liable for whatever damages such lessor suffers by his land being drained of gas.[90] A lease providing that the lessee shall not remove the casing and plug the well without the consent of the lessor on abandonment of the premises is not void, though a statute expressly requires the casing to be withdrawn and the well plugged by the lessee on an abandonment of the lease.[90a]

[88] § 298. Marshall v. Mellon, 179 Pa. 371; 36 Atl. 201; 57 Am. St. 601; 35 L. R. A. 816.

[89] Fleming Oil & Gas Co. v. South Penn. Oil Co., 37 W. Va. 645; 17 S. E. 203; Henderson v. Ferrell, 183 Pa. 547; 38 Atl. 1018.

[90] Talbott v. Southern Oil Co., 60 W. Va. 423; 55 S. E. 1009. As to State's power to compel plugging of dry wells, see §§ 49 and 385.

[90a] Johnson v. Hukel (Cal. App.), 154 Pac. 487.

§ 918. Exclusive grant to construct and operate pipe lines.

The grant to a lessee of the exclusive right to lay and operate a pipe line across the lessor's tract of land will not prevent a corporation having the right of eminent domain condemning a right of way over the same land; and the lessee is not entitled to compensation in such condemnation proceedings for the invasion of his exclusive right.[91] A subsequent purchaser of the tract may grant to others rights of way over it for the construction of pipe lines, or may himself construct and operate them, and the lessee cannot secure an injunction to prevent their being laid.[92]

§ 919. Reservation of oil and gas.

A vendor of land who has reserved the oil and natural gas under it may lease or convey such oil or gas, and the conveyance will vest the title thereto in his lessee or grantee and give him the right to enter upon the premises and mine for gas or oil, and, if found, market it.[93] But if the reservation is not sufficient to reserve the oil or gas then the vendor's lessee obtains no right to mine them; and the grantee or his lessee may enjoin him if he attempts to or does enter on the land to begin mining operations.[94]

§ 920. Several tracts under one lease.

If two or more separate landowners jointly execute a joint lease of their separate tracts for a joint rental or royalty, the lessee may enter upon any one of the tracts for exploration,

[91] Calor Oil & Gas Co. v. Frazell, 128 Ky. 715; 109 S. W. 328; 33 Ky. L. Rep. 98; Brookshire Oil Co. v. Casmalia Ranch Oil, etc., Co., 156 Cal. 211; 103 Pac. 927.

[92] West Virginia Transportation Line v. Ohio River Pipeline Co., 22 W. Va. 600; 46 Am. St. 527.

[93] Porter v. Mach. Mfg. Co., 65 W. Va. 636; 64 S. E. 853; Williams v. South Penn. Oil Co., 52 W. Va. 181; 43 S. E. 214; 60 L. R. A. 795; Sult v. Hochstetter Oil Co., 63 W. Va. 317; 61 S. E. 307; Murray v. Allred, 100 Tenn. 100; 43 S. W. 355; 66 Am. St. 740.

[94] Detlor v. Holland, 57 Ohio St. 492; 49 N. E. 690; 40 L. R. A. 266; McKinney's Heirs v. Central Ky. Nat. Gas Co., 134 Ky. 239; 120 S. W. 314.

and upon discovering oil or gas in paying quantities, he may hold all the lands upon payment of the royalties or gas rentals during and beyond the term of the lease, in accordance with its conditions, regardless of his failure to explore for or produce oil or gas from the other separate tract or tracts. The production of the oil or gas is a good defense in an action to cancel the lease as to the undeveloped tracts.[95] In Pennsylvania where a lessor died devising the leased premises to several devisees, it was held that each devisee was entitled to the proportional interest in the royalty or gas rental as his tract in acreage bore to the total acreage covered by the lease.[96] But in Ohio where the owners of two tracts of land executed a lease covering both tracts, and afterwards conveyed those tracts to different persons, it was held that each separate grantee was entitled to the royalty of the oils and gas rentals from the wells produced upon his tracts.[97] In West Virginia where two persons each owning a separate tract of land executed a joint lease covering both tracts, in consideration of a joint royalty of oil or gas rental, it was held that the question of the right of the owners to the royalty and rentals for wells on each separate tract was a question of fact; and that a contemporaneous agreement between them that the royalty should be paid or delivered to the owner of the particular tract from which the oil was produced might be proven, in determining to whom the royalties or gas rentals were to be paid.[98]

§ 921. Rival lessee claimants.

A court of equity and not a court of law has jurisdiction to settle the validity and priority of oil and gas leases between claimants, where they have been executed by a common landowner.[99] If a lessee be given the exclusive right to take the

[95] § 91. Harness v. Eastern Oil Co., 49 W. Va. 232; 38 S. E. 662.

[96] § 262. Wettengel v. Gormley, 160 Pa. 559; 28 Atl. 934; 40 Am. St. 733; Wettengel v. Gormley, 184 Pa. 354; 39 Atl. 57.

[97] Northwestern Ohio Nat. Gas Co. v. Ullery, 68 Ohio St. 259; 67 N. E. 494.

[98] Rymer v. South Penn. Oil Co., 54 W. Va. 530; 46 S. E. 459.

[99] Smith v. Root, 66 W. Va. 633; 66 S. E. 1005; 30 L. R. A. (N. S.) 136; Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. 839; 90 Fed. 178; 32 C. C. A. 560; Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. 933; Smith v. Linden Oil Co.,

oil and gas under a tract of land, he may file a bill in equity against a claimant under an adverse lease, whether made before or after his own lease, who has entered upon the premises and is producing and marketing oil or gas therefrom. The remedy is an injunction and accounting; and the court will settle all questions in dispute between the conflicting claimants, and cancel the invalid lease as a cloud upon the title of the valid lease. If the holder of the invalid lease has converted oil and gas to his own use, it will give a judgment against him in favor of the other lessee for the value of the oil and gas so taken out.[100] But if rival lessees claim

69 W. Va. 57; 71 S. E. 167; Freer v. Davis, 52 W. Va. 1; 43 S. E. 164; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 978; 44 L. R. A. 107; Galloway v. Campbell, 142 Ind. 324; 41 N. E. 597; Williamson v. Jones, 43 W. Va. 562; 27 S. E. 411; Powers v. Bridgeport Oil Co., 238 Ill. 397; 87 N. E. 381; Wilson v. Youst, 43 W. Va. 826; 28 S. E. 781; Thomas v. Hukill, 34 W. Va. 385; 12 S. E. 522; Crawford v. Ritchie, 43 W. Va. 252; 27 S. E. 320; Hukill v. Myers, 36 W. Va. 639; 15 S. E. 151; Williamson v. Jones, 39 W. Va. 231; 19 S. E. 436; Bettman v. Harness, 42 W. Va. 433; 26 S. E. 271; 36 L. R. A. 566; McGraw Oil Co. v. Kennedy, 65 W. Va. 595; 64 S. E. 1027; 28 L. R. A. (N. S.) 959; Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 928; Eastern Oil Co. v. Coulehan, 65 W. Va. 531; 64 S. E. 836; Eakins v. Hawkins, 48 W. Va. 264; 37 S. E. 622; Sult v. Hochstetter Oil Co, 63 W. Va. 317; 61 S. E. 307; South Penn. Oil Co. v. Edgell, 48 W. Va. 348; 37 S. E. 596; Headley v. Hoopengarner, 60 W. Va. 626; 55 S. E. 144; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. 655; 59 L. R. A. 566; Pheasant v. Hanna, 63 W. Va. 616; 60 S. E. 618; Friend v. Mallory, 52 W. Va. 43; 43 S. E. 114; Starn v. Huffman, 62 W. Va. 422; 59 S. E. 179; Lowther Oil Co. v. Guffey, 52 W. Va. 88; 43 S. E. 101; Peterson v. Hall, 57 W. Va. 535; 50 S. E. 63; Haskell v. Sutton, 53 W. Va. 206; 44 S. E. 533; Carnegie Nat. Gas Co. v. South Penn. Oil Co., 56 W. Va. 402; 49 S. E. 548; Pyle v. Henderson, 55 W. Va. 122; 46 S. E. 791; Carney v. Barnes, 56 W. Va. 581; 49 S. E. 423.

[100] Thomas v. Hukill, 34 W. Va. 385; 12 S. E. 522; Powers v. Bridgeport Oil Co., 238 Ill. 397; 87 N. E. 381; Hukill v. Myers, 36 W. Va. 639; 15 S. E. 151; Peterson v. Hall, 57 W. Va. 535; 50 S. E. 603; Trees v. Eclipse Oil Co., 47 W. Va. 107; 34 S. E. 933; Sult v. Hochstetter Oil Co., 63 W. Va. 317; 61 S. E. 307; Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 923; Pyle v. Henderson, 65 W. Va. 39; 63 S. E. 620; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583; 42 S. E. 655; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501; 44 S. E. 433; 97 Am. St. 1027; Friend v. Mallory, 52 W. Va. 53; 43 S. E. 114; Lowther Oil Co. v. Guffey, 52 W. Va. 88; 43 S. E. 101; Henne v. South Penn. Oil Co., 52 W. Va. 192; 43 S. E. 147.

under conflicting leases executed by rival lessors holding conflicting titles, a court of equity will not entertain jurisdiction to settle their claims; the remedy is in a court of law.[101] A lessee may secure in a court of equity a cancellation of an outstanding forfeited or void lease, or one made without consideration or one that is inequitable, unconscionable, or void for want of mutuality.[102] If necessary to protect the lines of the leased premises while the suit is pending, the court may appoint a receiver to make developments necessary to their protection, and for the purpose of preserving the status quo.[103] In Pennsylvania a lessee who has developed the premises may restrain by injunction the lessor or anyone acting under him from drilling on the leasehold; for the rights of the lessee are necessarily exclusive, and the damages to arise from the threatened invasion are deemed entirely incapable of measurement at law, even if not irreparable.[104]

§ 922. Specific performance.

If a lessee have no adequate remedy at law he may enforce specific performance of the provisions of the lease as against the lessor or anyone claiming in privity under him.[105] If a contract be unfair, unjust or against good conscience, specific performance will be refused, although an action for damages may be enforced at law.[106] Lack of mutuality is no defense, even if

[101] Freer v. Davis, 52 W. Va. 1; 43 S. E. 164; Sult v. Hochstetter, 63 W. Va. 317; 61 S. E. 307.

[102] Crawford v. Ritchie, 43 W. Va. 252; 27 S. E. 220; Steelsmith v. Gartlan, 45 W. Va. 27; 29 S. E. 927; 44 L. R. A. 107; Bettman v. Harness, 42 W. Va. 433; 26 S. E. 271; 36 L. R. A. 566.

[103] Sult v. Hochstetter Oil Co., 63 W. Va. 317; 61 S. E. 307; Doddridge County Oil & Gas Co. v. Smith, 154 Fed. 970; 173 Fed. 386; Elk Fork Oil & Gas Co. v. Foster, 99 Fed. 495; 39 C. C. A. 315; Galloway v. Campbell, 142 Ind. 324; 41 N. E. 597.

[104] § 110. Westmoreland, etc., Gas Co. v. DeWitt, 130 Pa. 235; 18 Atl. 724; 5 L. R. A. 731; Greensboro Nat. Gas Co. v. Fayette County Gas Co., 200 Pa. 388; 49 Atl. 768; Carnegie Nat. Gas Co. v. Philadelphia Co., 158 Pa. 317; 27 Atl. 95; Funk v. Haldeman, 53 Pa. 229.

[105] § 331. Carnegie Nat. Gas Co. v. South Penn. Oil Co., 56 W. Va. 402; 49 S. E. 548; Eclipse Oil Co. v. South Penn. Oil Co., 47 W. Va. 84; 34 S. E. 923; West Virginia etc., Co. v. Vinol, 14 W. Va. 637; Smith v. Root, 66 W. Va. 633; 66 S. E. 1005; 30 L. R. A. (N. S.) 176; Bettman v. Harness, 42 W. Va. 433; 26 S. E. 271; 36 L. R. A. 566.

[106] Federal Oil Co. v. Western Oil Co., 112 Fed. 373; affirmed 121 Fed. 674; 57 C. C. A. 428; Great Western Oil Co. v. Carpenter, 43 Tex. Civ. App. 229; 95 S. W. 57; Waterford

the lessee be not bound by the terms of the lease, if he has performed all the conditions of the contract and brought himself clearly within its terms.[107]

§ 923. Necessary parties to settle controversy between rival claimants.

If a lessee bring a suit in equity against another lessee to settle a controversy between them, he must make all persons interested under the rival lease parties, including the lessor.[108]

§ 924. Ejectment.

A lease of land in Pennsylvania which demises grants and lets a tract of land for the exclusive right to enter and develop the oil and gas, conveys an interest in the land, and the lessee may maintain ejectment against one who has entered into possession and claims adversely to him, even though he, the lessee, has never entered into possession of the land.[109] He may maintain the action against a second lessee of the same lessor, if he show he has entered into possession and not abandoned the premises.[110] If the lease give the lessee only the privilege and exclusive right to enter and explore for oil and gas, and the land itself is not granted, he cannot maintain ejectment to secure possession, but must sue for damages.[111] But in Illinois a lease giving the lessee the right to surrender the lease will bar his right to maintain an action of ejectment;[112] nor will that prevent the federal courts from giving relief in equity according to the federal rules of equity.[113]

Oil & Gas Co. v. Shipman, 233 Ill. 9; 84 N. E. 53.

[107] Boyd v. Brown, 47 W. Va. 238; 38 S. E. 668.

[108] Moore v. Jennings, 47 W. Va. 181; 34 S. E. 793; South Penn. Oil Co. v. Miller, 175 Fed. 729; 99 C. C. A. 305; Steelsmith v. Foster Oil Co., 47 W. Va. 391; 35 S. E. 15; Newton v. Kemper, 66 W. Va. 130; 66 S. E. 102; Pyle v. Henderson, 55 W. Va. 122; 46 S. E. 791.

[109] §130. Barnsdall v. Bradford Gas Co., 225 Pa. 338; 74 Atl. 207; 27 L. R. A. (N. S.) 614; Williams v. Fowler, 201 Pa. 336; 50 Atl. 969; Hicks v. American Nat. Gas Co., 207 Pa. 570; 57 Atl. 55.

[110] Bartley v. Phillips, 165 Pa. 325; 30 Atl. 842; Bartley v. Phillips, 179 Pa. 175; 36 Atl. 217.

[111] Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. 173.

[112] Watford Oil & Gas Co. v. Shipman, 233 Ill. 12; 84 N. E. 53; 122 Am. St. 144; Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188; 86 N. E. 219.

[113] Guffey v. Smith, 237 U. S. 101; 36 Sup. Ct. 526; 59 L. Ed. 856, reversing 202 Fed. 106; 120 C. C. A. 436.

APPENDIX A.

GAS AND OIL LEASES AND AGREEMENTS.

INDIANA.

GRANT OF OIL AND GAS.

IN CONSIDERATION of the sum of.....Dollars and the covenants and agreements hereinafter contained.....first part..hereby grant unto.....second party, his heirs or assigns, all the oil and gas in and under the following described premises, together with the exclusive right to enter thereon for the purpose of drilling or operating for oil or gas; to erect, maintain and remove all structures, pipe lines, and machinery necessary for the production and storage of oil, gas or water, namely: A lot of land situated in the Township of.....County of.....in the State of.....bounded and described as follows.....containing acres, more or less.

The above grant was made on the following terms:

Should oil be found in paying quantities upon the premises, second party agrees to deliver to the first party in the pipe line with which he may connect the well or wells, the.....part of all the oil saved from said premises.

If gas only is found, second party agrees to pay.....each year for the produce of each well while the same is being used off the premises, and first party shall have gas free of expense to light and heat the dwellings on the premises.

The second party shall have the right to use sufficient gas or water to run all machinery used by him in carrying on his operations on said premises, and the right to remove all his property at any time.

If no well is drilled within.....from this date then this grant shall become null and void unless second party shall pay to the first party for each.....thereafter such completion is delayed.....

IN WITNESS WHEREOF, The parties have hereunto set their hands this.....day of.....A. D. 190...

WITNESS:

.....

.....

OIL AND GAS GRANT.

IN CONSIDERATION of the sum of.....Dollars, the receipt of which is hereby acknowledged.....first part..hereby grant unto..... second party, its successors and assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas and water, and to erect and maintain all buildings and structures, and lay all pipe necessary for the production and transportation of oil, gas and water from said premises. Excepting and reserving, however, to first part..the part of all oil produced and saved from said premises, to be delivered in the pipe line with which second party may connect its wells, namely: All that certain lot of land situated in the Township of..... County of.....in the State of.....bounded and described as follows, to-wit:.....containing.....acres more or less.

Second party agrees, if gas is only found, to pay.....Dollars each year, in advance, for the product of each well while the same is being used off the premises, and first party to have gas free of cost to heat..... stoves in dwelling house during the same time.

Whenever first part..shall request it, second party shall bury all oil and gas lines, and pay all damages done to growing crops by reason of burying and removing said pipe lines.

No well shall be drilled nearer than.....feet to the house or barn on said premises, and no well shall occupy more than one acre.

In case no well is.....within.....from this date, then this grant shall become null and void, unless second party shall pay to said first part.....Dollars in advance for each.....thereafter such..... is delayed.

The second party shall have the right to use sufficient gas, oil and water, for all their operations, and also the right to remove all its property at any time, including the right to draw and remove casing.....

All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors and assigns.

IN WITNESS WHEREOF, The parties hereto have hereunto set their hands and seals this.....day of.....A. D. 19..

.....(Seal)

.....(Seal)

.....(Seal)

STATE OF INDIANA, }
COUNTY OF..... } ss.

On the.....day of.....A. D. 19.., before me, the subscriber, a..... in and for said county, personally appeared.....to me known to be the person named in, and who executed the foregoing instrument, and in due form of law acknowledge the same to be.....act and deed, for the uses and purposes therein mentioned, and desired that it might be recorded as such.

Witness my hand official seal.

.....(Seal)

OIL AND GAS GRANT.

IN CONSIDERATION of the sum of.....Dollars, the receipt of which is hereby acknowledged.....first part..hereby grant..unto..... second part.., successors and assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas and water, and to erect and maintain all buildings and structures, and lay all pipe necessary for the production and transportation of oil, gas and water from said premises. Excepting and reserving, however, to first part..the.....part of all oil produced and saved from said premises, to be delivered in the pipe line with which second party may connect the wells, namely: All that certain land situate in the Township of....., County of....., in the State of Indiana, described as follows, to-wit:.....containing acres more or less.

This grant is made for the period of five years from this date and as much longer as oil or gas is found in paying quantities under the terms and conditions herein contained.

Second part..agree.., if gas only is found, to pay.....Dollars each year, payable.....in advance, for the product of each well while the same is being used off the premises, and first part..to have gas free of cost, at the well, for domestic purposes on the farm.

Whenever first part..shall request it, second part..shall bury all oil and gas lines, and pay all damages done to growing crops by reason of burying and removing said gas lines.

No well shall be drilled neared than.....feet to the house or barn on said premises, and no well shall occupy more than one acre. The first part..shall fully use and enjoy said premises for farming purposes, except such parts as may be necessary for said operations.

In case no well is.....within.....from this date, then this grant shall become null and void, unless second part..shall pay to said first part.. in advance for each..... thereafter such.....is delayed.

Payments to be made as herein provided may be made direct to first part..or deposited to first party's credit in.....

It is understood and agreed between the parties hereto, that, second part..by giving to first part..thirty days' notice in writing of a desire to surrender this grant, may do so upon the payment to first part..of the sum of one dollar and releasing the same of record, and thereby be released from all further liabilities hereon.

The second part..shall have the right to use sufficient gas, oil and water, for all operations hereunder, and also the right to remove all property at any time, including the right to draw and remove casing.

All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors and assigns.

In Witness Whereof, the parties have hereunto set their hands and seals, this.....day of.....A. D. 190...

WITNESS:(Seal)

.....(Seal)

.....(Seal)

.....(Seal)

STATE OF INDIANA, COUNTY OF....., ss:

Before me, the undersigned Notary Public, personally appeared the within named.....and severally acknowledged the execution of the foregoing instrument to be.....free act and deed.

Witness my hand and official seal, this.....day of.....190...

.....(Seal)

Notary Public.

Commission expires.....190...

STATE OF INDIANA, COUNTY OF....., ss:

Before me, the undersigned Notary Public, personally appeared the within named.....and severally acknowledged the execution of the foregoing instrument to be.....free act and deed.

Witness my hand and official seal, this.....day of.....190...

.....(Seal)

Notary Public.

Commission expires.....190...

OIL OR GAS LEASE.

THIS LEASE, Made this.....day of.....A. D. 190.., by and between of the County of.....and State of Indiana of the first part, and The Hancock Oil Company of the second part,

WITNESSETH, That the said part..of the first part, in consideration of $1.00 in hand paid, the receipt of which is hereby acknowledged, and the stipulations, rents and covenants hereinafter contained, on the part of the said party of the second part, his executors, administrators and assigns, to be paid, kept and performed, have granted, demised and let unto the said party of the second part, his executors, administrators and assigns, for the sole and only purpose of drilling and operating for Petroleum Oil or Gas for the term of.....years with the privilege of.....years thereafter on the same terms and conditions at the option of the lessee. Said lessee to give thirty day's notice in writing before the expiration of said year of its intention to avail itself of said option, or as long thereafter as Oil or Gas is found in paying quantities, all that certain tract of land situated in.....Township.....County, State of Indiana, Being the.....Containing.....acres, more or less; excepting and reserving therefrom.....acres around the buildings on said premises, upon which there shall be no wells drilled; the boundaries of which shall be designated and fixed by the part..of the first part.

The said second party hereby agrees in consideration of the said lease of the above described premises, to give said first part.....Royalty Share.. of all the oil or mineral produced and saved from said premises, except for

operating purposes on the premises, delivered in tanks or pipe lines to the credit of first part... And further agrees to give $.....per annum for the gas from each and every well drilled on the above described premises, in case the gas be found in quantity to transport off the above described premises, and convey to market, which the second party is to be the sole judge thereof. The said second party not to unnecessarily disturb growing crops thereon, or the fences.

Said second party has the right, which is hereby granted him, to enter upon the above described premises at any time for the purpose of mining or excavating, and the right of way to and from the place of mining or excavating and the right to lay pipe lines for the purpose of conveying or conducting water, steam, gas, or oil over and across said premises, and also the right to remove at any time any or all machinery, oil well supplies or appurtenances of any kind belonging to the said second party.....

The party of the second part agrees to commence one well..... from the date hereof (unavoidable accidents and delays excepted), and in case of failure to commence one well within such time, the party of the second part hereby agrees to pay thereafter to the part..of the first part for any future delay, the sum of.....dollars per annum as a rental on the same thereafter until a well is commenced or the premises abandoned, payable at.....and the part..of the first part hereby agree..to accept such sum as full consideration and payment for such yearly delay until one well shall be commenced, and a failure to commence one well or to make any of such payments within such time and at such place as above mentioned, renders this lease null and void, and neither party hereto shall be held to any accrued liability, otherwise to be and remain in full force and virtue.

It is understood by and between the parties to this agreement that all conditions between the parties hereto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, We, the said parties of the first and second part, have hereto set our hand and seals the day and year first above written.

.....(Seal)

.....(Seal)

THE.....COMPANY,

Attest:..... By.....

Secretary. President.

STATE OF INDIANA. }
COUNTY OF..... } ss:

Before me, the undersigned, a Notary Public in and for said county, this.....day.....of.....190.., personally appeared.....and the Hancock Oil Company by its officers, William C. Dudding, President, and Ephraim Marsh, Secretary, and acknowledged the execution of the foregoing agreement.

IN WITNESS WHEREOF, I have hereunto set my hand and Notarial Seal, this.....day of....., 190...

.....

Notary Public.

AGREEMENT TO DRILL WELL.

AGREEMENT made and concluded this.....day of.....1899 by and between The Rowland-Zeiglar Oil Co., of Montpelier, Ind., party of the first part, and.....of.....party of the second part.

WITNESSETH, the first part hereto agrees to furnish one wood rig, the necessary drive pipe and casing on.....farm in Section.....in the Township of.....County of.....in the State of Indiana. Also shot, rods, pumping outfit and tank provided well proves a producer and the second party hereto, in consideration of.....cents per foot (which sum is to be paid to second part by first part when job is completed in accordance with the contract hereinafter set forth) agrees at his own cost and risk, furnishing all else that is necessary for the proper completion of an oil or gas well; and to effectually shut off all fresh water by making the casing entirely tight, a test of the casing to be made by use of the Device known as the casing tester, by first part on notice from second part that the well is on top of the sand, and to drill said well into the Trenton rock to any depth that the first part elects, not to exceed one hundred feet; to clean out after shot, on the following day from that on which the shot is put in, fit up and start said well to pumping in first-class shape.

Provided the well should prove a gas producer, to pack the well with the material furnished by first part for same, and making it an entirely tight job. And provided, further, that if neither gas or oil is found in paying quantity and the first part would want the piping and casing pulled out of said well, the second party hereto agrees to plug the well in accordance with the law and pull the piping without further charge excepting that the first part must pay for the use of the jacks or cutters if the same are required.

In the event the second party finds it necessary to have a water well at the said location, the first part agrees to furnish the necessary casing for the same, only.

.....
.....
.....

KANSAS

OIL, GAS AND MINERAL LEASE.

THIS LEASE, Made between....., party of the first part, and, parties of the second part, WITNESSETH, that in consideration of One Dollar, the receipt of which is hereby acknowledged, and the further consideration of drilling or excavating test wells in..... County, Kansas, for Oil, Gas and other minerals, or prospecting for other minerals.....party of the first part hereby agree with parties of the second part: That they shall have the exclusive right for Ten Years from this date to enter upon and operate for Oil, Gas and other Minerals all that certain tract of land in.....township.....County, Kansas, described as follows, to wit:

.....Section.....Twp, ...Range, ...Acres.....Containing acres, more or less, upon the following terms and conditions: Second parties shall deliver in tanks at the wells to the first party without cost, one-tenth of all Oil, produced on these premises; second parties shall also pay Fifty Dollars per year for each Gas well of sufficient capacity to utilize when used off the premises, and deliver on the dump, to the first party without cost, one-tenth of all mineral produced on these premises. If Oil, Gas or other Mineral is found in paying quantities in any well drilled, the privilege of operating shall continue as long as Oil, Gas or other Mineral shall be produced in paying quantities and when abandoned for such purposes this grant shall cease, and no longer be binding on either party. If Gas is found on the above described land the party of the first part is to have same for domestic purpose free. The second party reserves the right to remove all machinery and fixtures placed thereon by them. In case no Oil or Gas well is sunk or prospecting for other Mineral done on these premises within five years from this date this lease shall become absolutely null and void unless the second parties shall from year to year continue this lease by paying or depositing to the credit of the first party each year in advance.....Dollars at the..... until a well is completed or other prospecting done on the premises..... Party of the first part further agrees that for and in consideration of the considerations and covenants above contained that second party at..option may any time within.....year from this date purchase the above described property by paying.....Dollars per acre and first party at such payment agrees to deliver deed of above property free from all liens and encumbrances whatsoever. It is understod by and between the first and second parties to this agreement that all the conditions between the parties hereto shall extend to their heirs, executors and assigns.

IN WITNESS of which we hereunto set our hands and seal this the.... day of.....A. D. 190...

..... (Seal)

Witnesses: (Seal)

..... (Seal)

..... (Seal)

STATE OF KANSAS, }
COUNTY OF..... } ss

Be It Remembered, That on this.....day of.....190.., personally appeared before me.....personally known to me to be the persons who executed the foregoing instrument and said persons acknowledged the execution of the same.

In Witness Whereof I hereunto subscribe my name and affix my official seal.

My Commission expires on the.....day of.....190...

OIL AND GAS LEASE.

IN CONSIDERATION of the sum of One Dollar, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained.....first party, hereby grant unto Lanyon Zinc Company.

a New Jersey Corporation, second party, successors and assigns, all the Oil and Gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas or water, to erect, maintain and remove all buildings, structures, pipes, pipe lines and machinery necessary for the production and transportation of oil, gas or water.

PROVIDED: That the first party shall have the right to use said premises for farming purposes except such part as is actually occupied by second party, namely: A lot of land situated in the township of....., County of....., in the State of.....Section number.....Township number.....Range number.....containing.....acres, more or less.

THE ABOVE GRANT WAS MADE ON THE FOLLOWING TERMS:

1st. Second party agrees to drill a well upon said premises, within one year from this date, or thereafter pay to first party.....Dollars annually until said well is drilled, or the property hereby granted is conveyed to the first party.

2nd. Should Oil be found in paying quantities upon the premises, second party agrees to deliver to first party in tanks or in the pipe line with which it may connect the wells, the one-tenth part of all the oil produced and saved from said premises.

3rd. Should Gas be found, second party agrees to pay to first party Fifty Dollars annually for every well from which Gas is used off the said premises.

4th. The first party shall be entitled to enough Gas free of cost for domestic use in the residence on said premises as long as second party shall use Gas off said premises under this contract, but shall lay and maintain the service pipe at his own expense and use said Gas at his own risk. The said party of the second part further to have the privilege of excavating for water and of using sufficient water, Gas and Oil from the premises herein leased to run the necessary engines for the prosecution of said business.

5th. Second party shall bury, when requested to do so by the first party, all Gas lines used to conduct Gas off said premises and pay all damages to timber and crops by reason of drilling or the burying, repairing or removal of lines of pipe over the said premises.

6th. No well shall be drilled nearer than.....feet to any building now on said premises, nor occupy more than one acre.

7th. Second party may at any time remove all his property and re-convey the premises hereby granted and thereupon this instrument shall be null and void.

8th. A deposit to the credit of lessor, his heirs, executors or assigns in.....Bank, to the account of any of the money payments herein provided for, shall be a payment under the terms of this lease.

9th. If no well shall be drilled upon said premises within five years from this date, second party agrees to re-convey, and thereupon this instrument shall be null and void.

10th. A failure by second party to comply with any of the above conditions shall render this lease null and void.

IN WITNESS WHEREOF, the parties hereunto have set their hands and seal this.....day of.....A. D., 190..

Signed, sealed and delivered in the presence of

.....

.....(Seal)

.....(Seal)

.....(Seal)

.....COMPANY.

By.....(Seal)

COUNTY OF.....
STATE OF KANSAS, } ss

BE IT REMEMBERED, That on the.....day of.....A. D., 190.., before me a Notary Public for the County and State aforesaid came personally known to me to be the same persons who executed the foregoing instrument and said persons duly acknowledge the execution of the same.

Witness my hand and official seal the day and year aforesaid.

My commission expires the.....day of.....A. D., 190...

....., Notary Public.

OHIO

OIL AND GAS LEASE.

IN CONSIDERATION of the sum of.....Dollars, the receipt of which is hereby acknowledged.....first part..hereby grant unto..... second party, successors or assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas or water, and to erect and maintain all buildings and structures, and lay all pipes necessary for the production and transportation of oil, gas or water from or over said premises. Excepting and reserving, however, to first party the.....part of all oil produced and saved from said premises, to be delivered in the pipe line with which second party may connect.....wells, namely: All that certain lot of land situated in the Township of..... County of.....in the State of.....bounded and described as follows, to-wit:

To have and to hold the above premises, for the said purposes only, for and during the term of twelve years, ...from the date hereof, and as much longer as Oil or Gas shall be found in paying quantities.

If gas only is found, second party agrees to pay.....dollars each year, in advance, for the product of each well while the same is being sold off the premises, the first party to have gas free of cost at the well to heat stoves in dwelling house during the same time.

Whenever first party shall request it, second party shall bury all oil and gas lines, and pay all damages done to growing crops by reason of burying and removing said pipe lines.

No well shall be drilled nearer than.....feet to the house or barn on said premises, and no well shall occupy more than one acre.

In case no well is completed within.....from this date, then this grant shall become null and void, unless second party shall pay to the said first party.....dollars in advance for each year such completion is delayed.

The second party shall have the right to use sufficient gas, oil or water to run all necessary machinery for operating said wells, and also the right to remove all of his property at any time.

It is expressly stipulated and agreed that the party of the second part may, at any time in its option, in consideration and payment of one dollar to the party of the first part, his heirs or assigns, surrender and cancel this lease and terminate all right and rescind all obligations of either and all of the parties hereto, their successors, heirs or assigns.

It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this.....day of.....A. D., 190...

Signed, sealed and delivered in the presence of

.....

.....(Seal)

.....(Seal)

.....(Seal)

STATE OF....., ...COUNTY, ss:

Before me, ..., a..... in and for said County and State, personally appeared.....and acknowledged the execution of the within lease to be.....voluntary act and deed.

WITNESS, My hand and.....Seal, this.....day of.....190...

.....(Seal)

OIL AND GAS LEASE.

AN AGREEMENT, Made the.....day of.....A. D., 190..between of the.....County of..... and State of.....Lessor..and..... of.....Lessee...

WITNESSETH, That the lessor, in consideration of ONE DOLLAR, the receipt of which is hereby acknowledged, and of other valuable considerations do..hereby demise, grant and let unto the lessee.....heirs and assigns, all the oil and gas in and under the following described tract of land, and also the said tract of land for the purpose and with the exclusive right of operating thereon for said oil and gas, together with the right of way, the right to lay pipes over, to use water from, and also the right to remove, at any time, all property placed thereon by the lessee.. which tract of land is situated in the.....of.....County of.....and State of.....and is bounded and described as follows, to-wit:..... To have and to hold the same unto the lessee..heirs and assigns for the term and period of.....year..from the date hereof, and as much longer as oil or gas is found in paying quantities thereon or the rental paid by lessee.

The lessee..shall pay to the lessor..the.....part of all the oil produced and saved from the premises, and deliver free of expense into tanks

or pipe lines to the lessor's credit, and should any well produce gas in sufficient quantities to justify marketing, the lessor..shall be paid at the rate of.....dollars per year for such well so long as the gas therefrom is sold.

If no well be completed on the above described premises within..... from the date hereof, then this lease shall become null and void unless the lessee..shall thereafter pay for further delay at the rate of..... dollars per year until a well shall be completed. Said amount may be paid in hand or by deposit to the lessor's credit.

The lessor to have sufficient gas for heating dwellings on said premises free of charge at the wells. All pipe lines to be buried below plow depth.

.....

It is further agreed, that the lessee shall pay all damage done to growing crops and shall operate the well within three months after said well is completed.

It is fully understood by and between the parties hereto, that the rights and privileges herein conferred shall be construed to mean simply a lease of privilege to drill and operate as above set forth, for gas and oil; and any attempt, on the part of the second party, to exceed the privileges granted, as so construed, shall render the same liable for trespass; and, furthermore, shall work a forfeiture of all the rights conferred, and this instrument shall become null and void.

IT IS FURTHER AGREED, That the lessee..shall have the right at any time to surrender this lease to the lessor..and thereby be fully discharged from any and all damages or claims whatsoever arising from any neglect or nonfulfillment of the foregoing contract.

It is understood that all the terms and conditions between the parties hereto shall extend and apply to their respective heirs, executors, administrators and assigns.

IN WITNESS WHEREOF, The said parties have hereunto set their hands and seal, the day and year first above written.

Sealed and delivered in the presence of

.....(Seal)

.....(Seal)

.....(Seal)

STATE OF OHIO
COUNTY OF..... } ss.

On this.....day of.....A. D., 190..before me, a.....in and for said county, personally appeared the above named.....and acknowledged that.....did sign and seal the within instrument, and that the same is.....free act and deed for the purpose herein named.

.....(Seal)

GAS AND OIL LEASE.

IN CONSIDERATION of the sum of One Dollar, the receipt of which is hereby acknowledged.....of.....of the First Part, hereby Grant and Guarantee unto.....Second Party all the Oil and Gas in and under the following described premises, together with the right to enter thereon

at all times for the purpose of Drilling and Operating for Oil and Gas and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of Oil and Gas. The First Party shall have the one-eighth (1-8) part of Oil produced and saved from said premises, to be delivered to the Pipe Line with which Second Party may connect.....wells, namely: All that certain lot of land, in the Township of.....County of.....in the State of.....bounded and described as follows, to-wit:.....containing.....acres, more or less.

To have and to hold the above described premises on the following conditions, for and during the term of Five years from the date hereof and as long after said term of years as Oil and Gas can be found on said real estate in paying quantities or the rental is paid thereon as hereafter herein provided.

If Gas only is found, in sufficient quantities to transport, Second Party agrees to pay First Party One Hundred ($100) Dollars annually for the product of each and every well so transported, and First Party to have Gas free of cost for heating and lighting purposes in dwelling house. Second Party shall bury all Oil and Gas lines when same interfere with cultivation, and pay all damages done by reason of operating under this grant.

It is agreed that Part..of the Second Part is hereby given the option to purchase the above described land at the sum of.....Dollars per acre on or before the.....day of....., 190..

In case no well is commenced within.....from this date, then this grant shall become null and void unless Second Party shall thereafter pay at the rate.....Dollars for each year such commencement is delayed. A deposit to the credit of the First Party in.....will be good and sufficient payment for any money falling due on this grant. First Party has right to locate roads to and from places of operation.....

The Second Party shall have the right to use sufficient Gas, Oil and Water to run all machinery for operating said Wells, also the right to remove all its property at any time, and may cancel and annul this contract or any undrilled portion thereof at any time upon payment of One Dollar to said First Party and releasing the same of record.

It is understod between the parties of this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assignees.

IN WITNESS WHEREOF, The parties hereunto set their hands and seals this.....day of.....A. D., 190...

.....

.....

.....

STATE OF INDIANA, COUNTY OF.....ss:

Before me....., a Notary Public in and for said County, this..... day of....., 190.., personally appeared the above named..... to me well known, and acknowledged the execution of the above and foregoing instrument to be their free act and deed.

Witness my hand and Notarial seal this day and year above written.

My commission expires.....190...

OIL AND GAS LEASE.

IN CONSIDERATION of the sum of One Dollar, the receipt of which is hereby acknowledged, ..., of....., first part.., hereby grant unto, second party, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for Oil or Gas, and to erect and maintain all buildings and structures, and lay all pipes necessary for the production and transportation of Oil or Gas taken from said premises. Excepting and reserving, however, to first part..the one-eighth (⅛) part of all oil produced and saved from said premises, to be delivered in the pipe line with which second party may connect his wells, namely: All that certain lot of land situate in the township of....., County of..... in the State of....., bounded and described as follows, to-wit:..... containing.....acres, more or less.

To have and to hold the above premises on the following conditions: If gas only is found, second party agrees to pay.....Dollars each year for the product of each well while the same is being used off the premises, and first party to have gas free of cost to heat.....stoves in dwelling house during the same time.

In case no well is completed within.....from this date, then this grant shall become null and void, unless second party shall pay to said first part.. Dollars annually for each year thereafter such well is delayed.

The second party shall have the right to use sufficient gas, oil or water, to run all machinery for operating said wells, and also the right to remove all its property at any time.....

It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this.....day of....., A. D. 190...

..... (Seal)
..... (Seal)
..... (Seal)
..... (Seal)

STATE OF.....
COUNTY OF..... } ss.

Before me.....in and for said county aforesaid, personally appeared and acknowledged the execution of the foregoing lease.

Witness my hand and.....seal this.....day of....., 190...

.....

OHIO AND PENNSYLVANIA

OIL LEASE.

[*Entered according to Act of Congress in the year* 1886, *by J. A. Heydrick, of Butler, Pa., in the Office of Librarian of Congress, at Washington, D. C., and used by his permission.*]

AGREEMENT, Made and entered into this.....day of.....A. D. 190.., by and between.....of the County of.....and State of party of the first part, and.....party of the second part.

WITNESSETH, That the said party of the first part, for and in consideration of the sum of.....Dollars, to him in hand well and truly paid, the receipt of which is hereby acknowledged, and in further consideration of the covenants and agreements hereinafter mentioned, does covenant and agree to lease, and by these presents has leased and granted the exclusive right unto the party of the second part, his heirs or assigns, for the purpose of operating and drilling for petroleum and gas, to lay pipe lines, erect necessary buildings, release and sub-divide all of that certain tract of land situate in.....Township, ...County and State of..... and bounded and described as follows, to-wit:

Bounded on the North by the lands of.....on the East by the lands of on the South by the lands of.....on the West by the lands of Containing.....acres, ... The party of the second part, his heirs or assigns, to have and to hold the said premises for and during the term of fifteen years from the date hereof, and so long thereafter as oil or gas can be produced in paying quantities.

The party of the second part, his heirs or assigns, agrees to give to the party of the first part one-eighth part of all the petroleum obtained from the said premises, as produced in a crude state, the said one-eighth part of the petroleum to be set apart in the pipe line running said petroleum to the credit and for the benefit of the said party of the first part. The said party of the first part is to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said mining purposes, and a right of way over and across the said premises to the place or places of mining or operating. The said party of the second part is further to have the privilege of using sufficient gas and water from the premises herein leased to run the necessary engines, the right to remove any machinery, fixtures and buildings placed on said premises by said party of the second part, or those acting under him, and is not to put down any well for oil on the lands hereby leased within ten rods of the buildings now on said premises without the consent of the said party of the first part.....

IT IS AGREED, That if gas is found in paying quantities, the consideration in full to the party of the first part for gas shall be.....Dollars, per annum for the gas from each well when utilized off the aforesaid premises.

The party of the second part agrees to commence operations within from the execution of this lease, or in lieu thereof thereafter pay to the said party of the first part.....dollars per annum until work is commenced.

AND IT IS FURTHER AGREED, That the second party, his heirs or assigns, shall have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled, then and from that time this lease and agreement shall be null and void and no longer binding on either party, and the payments which shall have been made shall be held by the party of the first part as the full stipulated damages, for the non-fulfillment of the foregoing contract; that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, we, the said parties of the first and second parts, have hereunto set our hands and seals the day and year first above written.

WITNESS:

.....(Seal)

.....(Seal)

COMMONWEALTH OF.. }
COUNTY OF..... }

BE IT REMEMBERED, That on the.....day of.....A. D. 190.. before me, a.....in and for said county, personally came the above named.....and in due form of law acknowledged the above indenture to be.....act and deed, and desired that the same might be recorded as such.

.....(Seal)

AGREEMENT.

[*Entered according to the Act of Congress in the year* 1886, *by J. A. Heydriek, of Butler, Pa., in the offiee of Librarian of Congress at Washington, D. C., and used with his permission.*]

THIS AGREEMENT, Made and entered into this.....day of..... A. D. 190.., by and between.....of the first part, and.....of the second part.

WITNESSETH, That the said.....for and in consideration of the sum of.....Dollars, to.....well and truly paid by.....the receipt and payment of which is hereby acknowledged, has sold, granted, conveyed, assigned, transferred and set over and by these presents do sell, grant, convey, assign, transfer and set over unto the said.....heirs and assigns interest in the within lease made by.....to.....on the day of.....190.., with.....of the property, rights of property, interest, powers and possessions of every kind therein conveyed, all and singular, subject to the conditions therein specified.....

IN WITNESS WHEREOF, The parties have hereunto set their hands and seals the day and year first above written.

WITNESS:(Seal)

.....(Seal)

.....(Seal)

.....(Seal)

COMMONWEALTH OF.. }
COUNTY OF..... } ss.

BE IT REMEMBERED, That on the.....day of.....A. D. 190.. before me, a.....in and for said county, personally came the above named and in due form of law acknowledged the above indenture to be.....act and deed, and desired that the same might be recorded as such.

.....(Seal)

OHIO AND WEST VIRGINIA

OIL LEASE.

AGREEMENT, made and entered into this.....day of.....A. D., 190.., by and between.....of the county of.....and State of party of the first part and.....party of the second part.

WITNESSETH, That the said part..of the first part, for and in consideration of the sum of.....Dollars to him in hand well and truly paid, the receipt of which is hereby acknowledged, and in further consideration of the covenants and agreements hereinafter mentioned, does covenant and agree to lease, and by these presents has leased and granted the exclusive right unto the party of the second part, his heirs or assigns, for the purpose of operating and drilling for petroleum and gas, to lay pipe lines, erect necessary buildings, re-lease and sub-divide all that certain tract of land situate in.....district; county and State of and bounded and described as follows, to-wit:

On the North by lands of.....; on the East by lands of.....; on the South by lands of.....; on the West by lands of.....; containing acres..... The party of the second part, his heirs or assigns, to have and to hold the said premises for and during the term of.....from the date hereof, and so long thereafter as oil or gas can be produced in paying quantities, or rental paid thereon.

The party of the second part, his heirs or assigns, agrees to give to the party of the first part one-eighth part of the petroleum obtained from said premises, as produced in the crude state, the said one-eighth part of the petroleum to be set apart in the pipe line running said petroleum, to the credit and for the benefit of the said party of the first part. The said party of the first part is to fully use and enjoy the said premises for the purpose of tillage, except such parts as shall be necessary for said mining purposes, and a right of way over and across said premises to the place of mining or operating. The said party of the second part is further to have the privilege of using sufficient gas and water from the premises herein leased to run the necessary engines, the right to remove any machinery, fixtures and buildings placed on said premises by said party of the second part, or those acting under him, and is not to put down any well for oil on the lands hereby leased within.....feet of the buildings now on said premises without the consent of both parties in writing.

Party of the second part agree to pay damage done to growing crops by their operations on said premises.

IT IS AGREED, That if gas is found, in paying quantities, the consideration in full to the party of the first part for gas shall be..... Dollars per annum for the gas from each well when utilized off the premises of the parties of the second part.

Part..of the first part to have gas for domestic purposes free by making his own connections to well or wells. Party of the second part to have privilege of disconnecting, pulling casing or abandoning said well or wells without becoming liable for any damage to party of first part.

The party of the second part agree to commence operations within from the execution of this lease, or in lieu thereof thereafter pay to the said party of the first part.....until the work is commenced, payable at.....

AND IT IS FURTHER AGREED, That the second party, his heirs or assigns, shall have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party, and the payments which shall have been made be held by the party of the first part as the full stipulated damages for the non-fulfillment of the foregoing contract; that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, We, the said parties of the first and second parts, have hereunto set our hands and seals the day and year first above written.

In Presence of

.....(Seal)
.....(Seal)
.....
.....(Seal)
.....(Seal)

STATE OF WEST VIRGINIA,
COUNTY OF.....
To-wit:

I....., a.....of said county of....., do certify that.....and his wife, whose names are signed to the within writing, bearing date the.....day of.....A. D., 190..ha..this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190..

.....

THE STATE OF OHIO, }
COUNTY OF.....} ss.

Be it remembered that on the.....day of.....A. D., 190..before me, the subscriber, a.....in and for said county, personally came..... and.....his wife, and acknowledged the signing and sealing of the foregoing instrument to be.....act and deed for the use and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal the day and year above written.

.....

OIL LEASE.

AGREEMENT, made and entered into this.....day of.....A. D., 190..by and between.....of the county of.....and State of.....party of the first part and.....party of the second part.

WITNESSETH, That the said part..of the first part, for and in consideration of the sum of.....Dollars, to him in hand well and truly paid, the receipt of which is hereby acknowledged, and in further consideration of the covenants and agreements hereinafter mentioned, does covenant and agree to lease, and by these presents has leased and granted the exclusive right unto the party of the second part, his heirs or assigns, for the purpose of operating and drilling for petroleum and gas, to lay pipe lines, erect necessary buildings, re-lease and sub-divide all that certain tract of land situate in.....district, ...county and State of..... and bounded and described as follows, to-wit:

On the North by lands of.....; on the East by lands of.....; on the South by lands of.....: On the West by lands of.....; containing acres, ... The party of the second part, his heirs or assigns, to have and to hold the said premises for and during the term of from the date hereof, and so long thereafter as oil or gas can be produced in paying quantities, or rental paid thereon.

The party of the second part, his heirs or assigns, agrees to give to the party of the first part one-eighth part of the petroleum obtained from said premises, as produced in the crude state, the said one-eighth part of the petroleum to be set apart in the pipe line running said petroleum, to the credit and for the benefit of the said party of the first part. The said party of the first part is to fully use and enjoy the said premises for the purpose of tillage, except such parts as shall be necessary for said mining purposes, and a right of way over and across said premises to the place of mining or operating. The said party of the second part is further to have the privilege of using sufficient gas and water from the premises herein leased to run the necessary engines, the right to remove any machinery, fixtures and buildings placed on said premises by said party of the second part, or those acting under him, and is not to put down any well for oil on the lands hereby leased within ten rods of the buildings now on said premises without the consent of both parties in writing.

IT IS AGREED, That if gas is found, in paying quantities, the consideration in full to the party of the first part for gas shall be..... Dollars per annum for the gas from each well when utilized.

The party of the second part agree to commence operations within from the execution of this lease, or in lieu thereof thereafter pay to the said party of the first part.....dollars per annum until the work is commenced. A failure to pay such rental shall render this lease null and void.

AND IT IS FURTHER AGREED, That the second party, his heirs or assigns, shall have the right at any time to surrender up this lease,

and be released from all moneys due and conditions unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party, and the payments which shall have been made be held by the party of the first part as the full stipulated damages for the non-fulfillment of the foregoing contract; that all conditions between the parties hereunto shall extend to their heirs, executors and assigns.

IN WITNESS WHEREOF, We, the said parties of the first and second parts, have hereunto set our hands and seals the day and year first above written.

In Presence of

.....(Seal)
.....(Seal)
.....
.....(Seal)
.....(Seal)

STATE OF WEST VIRGINIA, }
COUNTY OF..... } To-wit:

I, ...a.....of said county of....., do certify that.....and his wife, whose names are signed to the within writing, bearing date the.....day of.....A. D., 190.., ha..this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190..

.....
.....

THE STATE OF OHIO, }
COUNTY OF..... } ss.

Be it remembered that on the.....day of.....A. D., 190..before me, the subscriber, a.....in and for said county, personally came..... and.....his wife, and acknowledged the signing and sealing of the foregoing instrument to be.....act and deed for the use and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal the day and year above written.

.....

OIL AND GAS LEASE.

AGREEMENT OF LEASE, Made this.....day of.....A. D., 190.. between.....of....., Lessor.., and....., Lessee.., Witnesseth:

That the lessor does hereby grant unto lessee for the term of..... years (and so long thereafter as oil or gas is produced from the land leased and royalty or rentals paid by lessee therefor) the exclusive right to mine for and produce petroleum and natural gas from, and the possession of so much of.....acres of land.....Township.....County, State of.....as may be necessary therefor, with the right to use water and gas (if found) for the necessary engines, and to remove all machinery, fixtures, etc., placed by the lessee on the premises. Said land bounded: North by lands of.....; East by land of.....; South by lands of

....., and West by lands of..... No well will be drilled within feet of the buildings without the lessor's consent. The lessee to deliver to lessor, in pipe line, the one-eighth of all petroleum produced from the premises, and to pay.....dollars per annum for each gas well from which gas is marketed, payable yearly from the date and while the same is so utilized, and to pay all damages to growing crops. If gas is found on the premises the lessee is to have sufficient gas for fuel purposes in the operation of this lease; lessor is to have gas for household purposes free of charge. Lessee is to have all rights and privileges necessary for the proper use and enjoyment of this lease.

This lease to be null and void and no longer binding on either party if a well is not completed on the premises within.....months from this date, unless the lessee shall thereafter pay monthly to the lessor.....dollars per month for each month's delay in commencing said well. Each payment to extend the time for commencing for one month and no longer. A deposit to credit of lessor in.....Bank.....to be good payment of any moneys on this lease.

All grants and covenants to extend to the heirs and assigns of the parties hereto.

Witness the hands and seals of the parties.

WITNESS:(Seal)

.....(Seal)

.....(Seal)

.....(Seal)

STATE OF OHIO, ...COUNTY, ss.

Be it remembered, that on the.....day of.....A. D., 190.., before me, a.....in and for said County, personally came the above named and in due form of law acknowledges the within agreement to be.....free act and deed, and desired that the same might be recorded as such.

.....(Seal)

STATE OF WEST VIRGINIA, COUNTY OF.....To-wit:

I, ..., a.....of said county of.....do certify that.....and his wife, whose names are signed to the within writing, bearing date the.....day of.....A. D., 190.., have this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190...

.....

ASSIGNMENT OF LEASE.

KNOW ALL MEN BY THESE PRESENTS, That.....for and in consideration of the sum of.....Dollars the receipt of which is hereby acknowledged, has this day transferred, conveyed and sold unto..... my.....interest in the foregoing lease.

WITNESS:

.....

.....

.....

.....

ACKNOWLEDGMENT OF TRANSFER.

STATE OF.....COUNTY OF....., To-WIT:

I, ..., a.....of said county of....., do certify that..... whose name.....signed to the above writing bearing date the..... day of.....190.., ha..acknowledged the same to be.....free act and deed before me in my said county.....

Given under my hand and notarial seal this.....day of.....190.. State of.....

.....County.....Office.....190...

The foregoing writing and the certificate of acknowledgment thereof were this day admitted to record in this office.

Teste:.....

OIL AND GAS LEASE.

AGREEMENT, Made and entered into the.....day of.....A. D., 190.., by and between.....of.....County of.....and State of party of the first part, and.....party of the second part:

WITNESSETH, that the said party of the first part, for and in consideration of the sum of.....Dollars in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept and performed, has granted, demised, leased and let, and by these presents does grant, demise, lease and let unto the said party of the second part, his heirs, executors, administrators or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures, to take care of the said production. ALL that certain tract of land, situate in.....of..... County of.....and State of.....on waters of.....bounded substantially as follows:

On the North by lands of.....; on the East by lands of; on the South by lands of.....; on the West by lands of..... Containing acres, more or less.

IT IS AGREED that this lease shall remain in force for the term of ten years from this date, and as long as oil or gas, or either of them, is produced therefrom by the party of the second part, its successors and assigns.

IN CONSIDERATION OF THE PREMISES the said party of the second part covenants and agrees; 1st—To deliver to the credit of the first party, his heirs or assigns, free of cost, in the pipe line to which it may connect its wells, the equal one-eighth part of all oil produced and saved from the leased premises; and 2nd—to pay Dollars per year for the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises, said payment to be made on each well within sixty days after commencing to use the gas therefrom, as aforesaid, and to be paid yearly, thereafter while the gas from said well is so used.

Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm, and to drill no well within.....feet of the buildings on these premises, except by consent of the first party.

Provided, however, that this lease shall become null and void, and all rights hereunder shall cease and determine unless a well shall be completed on the said premises within.....from the date hereof, or unless the lessee shall pay at the rate of.....Dollars quarterly, in advance for each additional three months such completion is delayed, from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease. Such payments may be made direct to the lessors or by check to order of.....deposited in the post office by registered letter directed to.....

IT IS AGREED that the second party shall have the privilege of using sufficient water from the premises to run all necessary machinery and at any time to remove all machinery and fixtures placed on said premises; and, further, shall have the right at any time to surrender this lease to the first party for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms, shall cease and determine, and this lease becomes absolutely null and void.

Witness the following signatures and seals:

WITNESS:

.....(Seal)

.....(Seal)

.....(Seal)

.....(Seal)

STATE OF WEST VIRGINIA, COUNTY OF.....To-wit:

I, ...a.....of said County of....., do certify that.....and..... his wife, whose names are signed to the within writing, bearing date the day of.....A. D., 190.., ha..this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190..

.....

THE STATE OF OHIO, COUNTY OF....., ss.

Be it remembered that on the.....day of.....A. D., 190..before me, the subscriber, a.....in and for said county, personally came.....and his wife, and acknowledged the signing and sealing of the foregoing instrument to be.....act and deed for the use and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal the day and year above written.

.....

OIL AND GAS LEASE (NEW).

THIS INDENTURE, Made the.....day of.....A. D., 1.....between.....of the.....of.....County of.....and State of..... lessor and....., lessee.

WITNESSETH, That the lessor.., in consideration of.....Dollars, the receipt whereof is hereby acknowledged, does hereby grant, demise and let unto the said lessee, all the oil and gas in and under the following described tract of land, with covenant for the lessee's quiet enjoyment of the term, and that lessor has the right to convey the premises to the said lessee; together with the exclusive right unto the lessee to operate and drill for petroleum and gas, to lay and maintain pipe lines, and erect and maintain telephone and telegraph lines, and buildings convenient for such operations; with the right to use water and gas from said lands, and right of way over same for any purpose, and right of ingress, egress and regress for such purposes, and of removing, either during or at any time after the term hereof, any property or improvements placed or erected in or upon said land by said lessee; with the right of sub-dividing and re-leasing all that tract of land situate in the.....of.....County of and State of.....and bounded and described as follows, to-wit:

On the North by the lands of.....; on the East by the lands of.....; on the South by the lands of.....; on the West by the lands of..... Containing.....acres, more or less.

TO HAVE AND TO HOLD unto and for the use of the lessee for the term of.....years from the date hereof and as much longer as oil or gas is produced in paying quantities, yielding to the lessor the one-eighth part of all the oil produced and saved from the premises, delivered free of expense into tanks or pipe lines to the lessor's credit; and should a well be found producing gas only, then the lessor shall be paid for each such gas well at the rate of.....Dollars for each year, so long as the gas is sold therefrom, payable quarterly while so marketed.

PROVIDED, That this lease shall become null and void unless operations shall be commenced on the premises and a well completed, unavoidable delay or accident excepted, within.....months from the date hereof, or, unless lessee shall pay at the rate of.....Dollars per....., payable in advance or within ten days thereafter for each additional..... such completion of well is delayed; and the completion of such well, productive or otherwise, shall vest in lessee, during the remainder of the term of this lease, rental free, the grant hereunder including the exclusive right to make such other and further search for oil or gas as lessee may wish.

Lessor is to fully use and enjoy said premises for the purpose of tillage, except such parts as may be used by lessee for the purposes aforesaid. Lessee is not to put down any well on the lands hereby leased within ten rods of the buildings now on said premises without the consent of the lessor in writing. Lessor may, if any well or wells on said premises produce sufficient gas, have gas for domestic purposes for one family, the lessor paying for connections at such point as may be from time to time designated by lessee.

The above rental shall be paid to lessor in person or by check deposited in postoffice directed to.....And it is further agreed, that lessee shall have the right at any time to surrender this lease, whereupon this lease shall be null and void; and that all conditions, terms and limitations

between the parties hereto shall extend to their heirs, personal representatives and assigns.

IN WITNESS WHEREOF, We, the said parties hereto, have hereunto set our hands and seals the day and year first above written.

WITNESS:

.....(Seal)
.....(Seal)
.....(Seal)
.....(Seal)

STATE OF WEST VIRGINIA, COUNTY OF....., To-WIT:

I, ...a.....of said County of....., do certify that.....and his wife, whose names are signed to the within writing, bearing date the.....day of.....A. D., 190.., ha..this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190..

.....
.....

STATE OF OHIO, COUNTY OF....., ss.

Be it remembered that on this.....day of.....A. D., 190..before me, a.....in and for said county, personally appeared the above named to me personally known to be the part..named in and who executed the within agreement and acknowledged to be.....act and desired the same to be recorded.

WITNESS my hand and.....seal the day and year aforesaid.

.....(Seal)

OIL AND GAS LEASE (NEW).

AGREEMENT, Made and entered into the.....day of.....A. D., 190.., by and between.....of.....County of.....and State of..... part..of the first part, and.....part..of the second part:

WITNESSETH, That the said part..of the first, for and in consideration of the sum of.....Dollars to.....in hand well and truly paid by the said part..of the second part, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept and performed, ha.. granted, demised, leased and let, and by these presents do..grant, demise, lease and let unto the said part..of the second part.....heirs, executors, administrators or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of the said products, ALL that certain tract of land, situate in.....District.....County and State of.....on waters of.....bounded substantially as follows:

North by lands of.....; East by lands of.....; South by lands of and West by lands of..... Containing.....acres, more or less, and being same land conveyed to the first part..by.....by deed, bearing date....., 190.., reserving, however, therefrom.....feet around the buildings on which no well shall be drilled by either party except by mutual consent.

IT IS AGREED that this lease shall remain in force for the term of ten years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, ... heirs, executors, administrators or assigns.

IN CONSIDERATION OF THE PREMISES the said part..of the second part covenants and agrees: 1st—To deliver to the credit of the first part.....heirs or assigns free of cost, in the pipe line to which it may connect its wells, the equal.....part of all oil produced and saved from the leased premises; and, 2nd—To pay.....Dollars per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises, said payment to be made on each well within sixty days after commencing to use the gas therefrom, as aforesaid, and to be paid yearly thereafter while the gas from said well is so used.

Second part..covenant..and agree..to locate all wells so as to interfere as little as possible with the cultivated portions of the farm. And further to complete a well on said premises within.....from the date hereof, or pay at the rate of.....Dollars quarterly, in advance, for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a ful liquidation of all rental under this provision during the remainder of the term of this lease. Such payments may be made direct to the lessor or deposited to.....credit in.....

IT IS AGREED that the second party shall have the privilege of using sufficient water from the premises to run all necessary machinery and at any time to remove all machinery and fixtures placed on said premises; and, further, upon the payment of.....Dollars, at any time, by the part..of the second part, ...heirs, successors of assigns, to the part.. of the first, ...heirs successors or assigns, said part..of the second part, ...heirs, successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms, shall cease and determine, and this lease become absolutely null and void.

Witness the following signatures and seals:

WITNESS.

.....(Seal)

.....(Seal)

.....(Seal)

.....(Seal)

STATE OF WEST VIRGINIA, COUNTY OF....., TO-WIT:

I, ..., a.....of said county of....., do certify that.....and his wife, whose names are signed to the within writing, bearing date the....day of.....A. D., 190.., have this day acknowledged the same before me in my said county.

Given under my hand this.....day of.....A. D., 190...

.....

STATE OF OHIO, ...County, ss.

Be it remembered that on the.....day of. A. D., 190.., before me, the subscriber, a.....in and for said county, personally came..... and.....his wife, and acknowledged the signing and sealing of the foregoing instrument to be.....act and deed for the use and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal the day and year above written.

OIL AND GAS GRANT.

IN CONSIDERATION of the sum of.....dollars, the receipt of which is hereby acknowledged.....grantor, ha..granted and conveyed, and do..hereby grant and convey, subject to the following conditions, unto grantee..all the Oil and Gas in and under the following described premises, to-wit: All that piece or parcel of land in the..... of.....county of.....and State of.....containing.....acres, be the same more or less.

This grant is subject, nevertheless, to any rights now existing to the lessee by virtue of the lease heretofore given on said land for oil and gas; but if said lease has expired or become void, or shall hereafter expire or become void, or if no such lease ever existed, said grantee shall have and is hereby granted, all the rights and privileges of drilling and operating on said land, to produce, store and remove the said oil and gas necessary and usually granted to the lessee in an oil and gas lease.

This grant and conveyance is made on condition that said grantee.. do..within.....days after a well shall have been drilled on said land to the usual depth for oil and gas, and been properly completed, tubed and tested for oil, pay unto the said grantor..the sum of.....dollars.

If said grantee shall, as he may do at his option, omit to pay the said sum of $.....within the time aforesaid, then this grant shall become as absolutely null and void as though it had never been made, and said grantor shall retain the sum first above mentioned as full liquidated damages. Depositing the sum of $.....in the bank at.....to the credit of said grantor shall be equivalent to payment of the same to and its acceptance by said grantor.

This grant shall expire.....years from this date, if no well shall have been drilled on said land by that time, unless the said sum of $..... shall be paid without the well being drilled.

This grant and the conditions, terms and provisions thereof, shall apply and extend to the said grantor..and grantee, their heirs, executors, administrators and assigns.

IN WITNESS WHEREOF we have hereunto set our hands and seals this day of.....A. D., 190...

WITNESS:

.....	(Seal)
.....	(Seal)
.....	(Seal)
.....	(Seal)
.....	(Seal)
.....	(Seal)

I, ...for said county, do certify that.....and.....his wife, whose names are signed to the writing hereto annexed, bearing date the day of.....190..have this day acknowledged the same before me.

Given under my hand this.....day of.....190..

.....

.....

TEXAS.

OIL AND GAS LEASE.

THIS LEASE, made and entered into this.....day of.....A. D., 190.., by and between.....of.....State of.....lessor.., and Petroleum Company, a Texas corporation, lessee, witnesseth:

The Lessor.., for and in consideration of the sum of.....dollar.., paid to the lessor..by the lessee, the receipt of which is hereby acknowledged, do..hereby grant, demise and let unto the lessee, its successors and assigns all the oil and gas in and under the following described tract of land, and also the said tract of land for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, together with the right-of-way and the right to lay pipes to convey water, oil, steam and gas, and to have sufficient water, oil and gas from the premises to drill and operate wells thereon and on adjoining leases, also such other privileges as are necessary for conducting said operations, and the right to remove at any time any and all property placed thereon by the lessee, all that certain tract or parcel of land situated in.....State of....., bounded and described as follows:.....containing..... acres, more or less, but no wells are to be drilled within.....feet of the present buildings without the consent of both lessor..and lessee.

TO HAVE AND TO HOLD the same unto the lessee for and during the term of ten years from the date hereof and as much longer as oil or gas is found in paying quantities thereon, yielding and paying to the lessor.. the.....(..) part or share of all the oil saved from that produced on the premises, delivered free of expense at the well into.....tanks or pipe line to the lessor's credit, and should any well on said premises produce gas in sufficient quantities to justify the lessee marketing same off said premises, the lessor..shall be paid at the rate of.....dollars a year for each and every well, the product of which is marketed and sold off said premises, the first payment to mature sixty days after a well is turned into a pipe line for marketing and to be paid.....thereafter while the gas from said premises is so sold.

Provided, however, that this lease shall become null and void and all rights hereunder shall cease and determine unless a well is commenced on said premises within.....from the date hereof, or unless the lessee shall pay to the lessor..a delay rental of.....per annum, payable quarterly in advance for every three months such commencement is delayed from the time above specified until a well is commenced, such payments to be made direct to the lessor..either by check mailed to.....or deposit to.....

credit in.....at.....and in default of the payment of such rental when due this lease shall become null and void and of no effect.

It is expressly understood and agreed between the lessor..and the lessee herein that the said lessee shall have the right to hold this lease for the period of ten years as above provided, and as long thereafter as oil or gas in paying quantities is produced therefrom, if a well is commenced as above specified or if the rental is paid promptly when due, and the said sum of.....dollar..this day received by the lessor..from the lessee is a consideration for the right of the lessee to hold said lease during said term either by commencing a well on said premises as herein provided or by paying the rental above specified.

The lessee agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm.

It is agreed that all the conditions and terms herein shall extend to the heirs, executors, successors and assigns of the parties hereto.

In witness whereof the lessor..and the lessee have hereunto set their hands and seals the day and year first above written.

WITNESS:

.....

.....

.....

STATE OF TEXAS, }
COUNTY OF..... }

Before me, the undersigned authority, on this day personally appeared known to me to be the person..whose name.....subscribed to the foregoing instrument and acknowledged to me that.....executed the same for the purposes and considerations therein expressed; and on this day also appeared before me....., wife of the said....., who having been examined by me privily and apart from her said husband, and having the said instrument by me fully explained to her, she the said....., acknowledged the same to be her act and deed, and declared that she had willingly executed the same for the purposes and considerations therein expressed and that she did not wish to retract it.

Given under my hand and seal of office this the.....day of.....A. D., 190..

.....

OKLAHOMA.

OIL AND GAS MINING LEASE.

(This lease was litigated in Shaffer v. Marks, 241 Fed. Rep. 139.)

This lease, made this 18th day of March, A. D. 1912, by and between J. H. Marks, a single man, H. L. Marks and wife, Marietta Marks, parties of the first part, and A. J. Terry, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one hundred twenty ($120.00) dollars, to us in hand well and truly paid by the said party of the second part, the receipt of which is hereby

acknowledged, and of the covenants and agreements hereinafter contained on the part of the party of the second part to be paid, kept and performed, has granted, demised, leased and let, and by these presents does grant, demise, lease and let, unto the said scond part—, his heirs, successors, or assigns, for the sole and only purpose of mining and operating for oil and gas, and the laying of pipe lines, and of building tanks, power stations and structures thereon to produce and take care of said products for the term of five years and as much longer thereafter as oil or gas is found in paying quantities, all that certain tract of land situated in the county of Creek, state of Oklahoma, described as follows, to wit: S. ½ N. E. ¼ and the N. W. ¼ of S. E. ¼ of section 33, township 17, range 7, and containing 120 acres, more or less.

In consideration of these premises said party of the second part covenants and agrees:

(1) To deliver to the credit of the first parties, their heirs or assigns, free of cost, in the pipe line to which the party of the second part may connect the well or wells, the equal one-eighth part of all oil produced and saved from the leased premises.

(2) To pay to the first parties one hundred dollars each year payable quarterly in advance for the gas from each well where gas only is found, while the same is being used off the premises, and the first party to have gas free of cost from any such well for the principal dwelling house on said land during the same time through connections made at his own risk and expense.

(3) To pay to the first party for gas produced from any oil well and used off the premises at the rate of twenty-five dollars, per year, for the time during which such gas shall be so used, said payments to be made each three months in advance.

The party of the second part agrees to commence a well on said premises within twelve months from the date hereof or thereafter pay the first parties a yearly rental of one hundred twenty dollars, payable quarterly in advance until said well is commenced, and it is agreed that the commencing and completing of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease.

The party of the second part shall not be bound by any change in the ownership of said lands until duly notified of such change, either by notice in writing duly signed by the parties to the instrument of conveyance, or by the receipt of the original instrument of conveyance or a duly certified copy thereof.

The party of the second part shall have the right to use, free of cost, gas, oil and water produced on said land for the operations thereon except water from the wells of first party. When requested by first party the second party shall bury all pipes below plow depths on cultivated lands.

No well to be drilled within less than 250 feet of the house or barn on said premises without consent of parties of the first part.

Second party shall pay for damages caused by rigs to growing crops on said lands.

The party of the second part shall have the right at any time to re-

move all machinery and fixtures placed on said premises including the right to draw and remove casing.

All payments which may fall due under this lease may be made directly to the lessors or deposited to their credit in Cushing State Bank, Cushing, Okla.

The party of the second part, his heirs, successors and assigns, shall have the right at any time, on the payment of one dollar to the party of the first part, heirs or assigns to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine: Provided, this surrender clause and the option therein reserved to the lessee shall cease and become absolutely inoperative immediately and concurrently with the institution of any suit in any court of law or equity by the lessee to enforce this lease, or any of its terms, or to recover possession of the leased land or any part thereof, against or from lessor, his heirs, executors, administrators or assigns, or any other person or persons.

All covenants and agreements herein set forth between the parties hereto shall extend to their heirs, executors, administrators, successors or assigns.

Witness the following signatures the day and year first above written.

J. H. Marks,
H. L. Marks,
Marietta Marks,
A. J. Terry.

APPENDIX B.

STATUTES CONCERNING PETROLEUM AND NATURAL GAS.

NOTE.—Probably in every State in the Union are statutes for the inspection of oils for burning purposes, and providing officers for that purpose. None of those are herein included. Only such statutes as pertain to petroleum in its natural state and to natural gas are included. Statutes for organization of companies for supplying natural gas as a commercial commodity are also omitted; but those for transporting oils by means of pipes are included.

CALIFORNIA.

INTRODUCTION.—The law of 1915, which is herewith presented, was drawn in response to a widespread demand among oil operators for some means of regulating the drilling of wells so that the operations of one concern would not damage the property of a neighbor by the infiltration of water. There was also a general realization of the fact that operations should if possible be so systematized as to win from the ground the greatest amount of oil at the least expense; underground water if uncontrolled would, of course, defeat such a purpose.

The underlying plan of the law was formulated by the State Mining Bureau upon the invitation of numerous operators. A tentative draft was submitted to the public, particular pains being taken to send a copy to every oil producing company in the State. Criticism was solicited and many helpful suggestions were received and incorporated in the law as it now stands. It is quite possible that actual test may bring out points wherein the law is inadequate, in which case the State Mining Bureau will continue its efforts toward improvement of the law, to the end that the interests of oil producers and the public generally may be best served.

In administering this law it is the desire of the State Mining Bureau to aid operators in accomplishing a purpose actually desired by most of them. It is not our desire to assume the role of a prosecuting officer thrusting regulations upon unwilling subjects. The only reasonable assumption is that most operators are eager to develop their oil lands to the best advantage and need no compulsion.

Much of the damage caused in the past has been due to misunderstanding between various operators and a lack of knowledge of underground conditions. Every well that has been drilled has disclosed some-

thing of underground conditions, but the records are scattered and frequently not available for the use of men drilling new wells. As much of this information as possible will be gathered and systematized and the results placed at the disposal of interested parties.

The field deputies will gather all the geological evidence afforded by a study of well logs and the ground surface. All suggestions and advice that can be given by this department will be at the disposal of oil operators.

California drillers have a wide reputation for the skill displayed in sinking deep and difficult wells. The State Mining Bureau does not expect to instruct such a body of men in their own special line of work but rather to place in their hands additional information, for coping with natural obstacles.

It is hoped that these remarks will make it clear that the work of this department can only be made successful by the hearty co-operation of every person who has gained some exact information at a certain locality or well. Suggestions for the improvement of our service will be at all times welcomed.

ESTABLISHMENT OF DEPARTMENT.

§ 1. Appointment of supervisor.
§ 2. Assistants.—Compensation.
§ 3. Duties of supervisor.
§ 4. Appointment of deputies and attorney.
§ 5. Duties of deputies.
§ 6. Collection of information.
§ 7. Records and their use.
§ 8. Order by supervisor.—Agents of operators.
§ 9. Rejection of supervisor's orders.
§ 10. Arbitration.
§ 11. Compensation.
§ 12. Testimony.
§ 13. Final decision.
§ 14. Repairs of wells.
§ 15. Casing, water shut off.
§ 16. Abandonment of well.
§ 17. Commencement of drilling.
§ 18. Log of well.
§ 19. Test of shut-off.
§ 20. Production reports.
§ 21. Penalty.
§ 21a. Charges levied to protect deposits of oil and gas.
§ 22. Charges assessed.
§ 23. Charges on oil.
§ 24. Charges on gas.
§ 25. Charges on land.
§ 26. Additional charges.
§ 27. Annual financial estimate.

§ 28. Reports by owners.
§ 29. Annual reports.
§ 30. Failure to report.
§ 31. Penalty.
§ 32. Extending time for report.
§ 33. Rate of assessment.
§ 34. Assessment, when made.
§ 35. Equalization.
§ 36. Publication of assessment notice.
§ 37. Record of assessment.
§ 38. Certificate of state mineralogist.
§ 39. Payment of charges.
§ 40. Publication of notice of payment of dues.
§ 41. Charges become lien.
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§ 43. Protest of charges.
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§ 51. Appropriation first year.
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PREVENTING WASTE OF NATURAL GAS.

§ 55. Wasting gas.
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§ 57. Penalty.
§ 58. "Day" defined.
§ 59. Repealing clause.
§ 60. Taking effect.
§ 61. Eminent domain.
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CHAPTER 718.

AN ACT establishing and creating a department of the state mining bureau for the protection of the natural resources of petroleum and gas from waste and destruction through improper operations in production; providing for the appointment of a state oil and gas supervisor; prescribing his duties and powers; fixing his compensation; providing for the appointment of deputies and employees; providing for their duties and compensation; providing for the inspection of petroleum and gas wells; requiring all persons operating petroleum

and gas wells to make certain reports; providing procedure for arbitration of departmental rulings; creating a fund for the purposes of the act; providing for assessment of charges to be paid by operators and providing for the collection thereof; and making an appropriation for the purposes of this act.

[Approved June 10, 1915.]

The people of the State of California do enact as follows:

ESTABLISHMENT OF DEPARTMENT.

§ 1. Appointment of supervisor.

Section 1. A separate department of the state mining bureau is hereby established and created to be known as the department of petroleum and gas. Such department shall be under the general jurisdiction of the state mineralogist. He shall appoint a supervisor who shall be a competent engineer or geologist experienced in the development and production of petroleum and who shall be designated the "state oil and gas supervisor," and whose term of office shall be four years from and after the date of his appointment.

§ 2. Appointment of assistants.—Compensation.

Sec. 2. For his services in the general supervision of said department, the state mineralogist shall receive as compensation one thousand four hundred dollars annually, which shall be in addition to his compensation fixed in section 2 of the act of June 16, 1913, relating to the state mining bureau.

The secretary of the state mining bureau shall receive for his services in connection with the department of petroleum and gas, a sum not to exceed six hundred dollars annually, which sum shall be in addition to his compensation paid from the funds of the state mining bureau.

The supervisor shall receive an annual salary of six thousand dollars, and shall be allowed his necessary traveling expenses. The state mineralogist may, at the request of the state oil and gas supervisor, and subject to the civil service laws of the state, appoint one chief clerk at a salary of not to exceed one thousand eight hundred dollars annually; twelve office as-

sistants or stenographers each at a salary not to exceed one thousand two hundred dollars annually; four geological draftsmen each at a salary not to exceed one thousand five hundred dollars annually; four petroleum engineers each at a salary not to exceed two thousand four hundred dollars annually; twelve inspectors each at a salary not to exceed one thousand eight hundred dollars annually.

The additional salary herein authorized to be paid to the state mineralogist and the secretary of the state mining bureau and the salaries of the supervisor and of the deputies, clerks, stenographers, assistants and other employees shall be paid out of the funds hereinafter provided for at the times and in the manner that salaries of other state officers and employees are paid. (As amended in 1917, and in force July 28, 1917.)

§ 3. Duties of supervisor.

Sec. 3. It shall be the duty of the state oil and gas supervisor so to supervise the drilling, operation and maintenance and abandonment of petroleum or gas wells in the State of California, as to prevent, as far as possible, damage to underground petroleum and gas deposits from infiltrating water and other causes and loss of petroleum and natural gas.

§ 4. Appointment of deputies and attorney.

Sec. 4. It shall be the duty of the state oil and gas supervisor to appoint one chief deputy and five field deputies, one for each of the districts hereinafter provided for and prescribe their duties and fix their compensation, which shall not exceed four thousand dollars per annum for the chief deputy and not to exceed three thousand six hundred dollars per annum for each field deputy. Such deputies shall serve during the pleasure of the supervisor. He shall also employ an attorney at a compensation not exceeding three thousand dollars per year, payable out of said fund, who shall also be attorney for each district board of commissioners; such commissioners may allow additional compensation to such attorney in actual litigation. The supervisor, the deputies and the

attorney shall not be subject to the civil service act. (As amended in 1917. In force July 28, 1917.)

§ 5. Duties of deputies.

Sec. 5. Each deputy appointed by the supervisor shall be a competent engineer or geologist, experienced in the development and production of petroleum. At the time said deputy is appointed, notice of such appointment shall be transmitted in writing to the board of commissioners of the district for which said deputy is appointed. Said notice shall be given either personally or by mailing a notice of said appointment to the post-office address of each commissioner. No appointment shall be final until a period of ten days shall have elapsed from the mailing of said notice to said commissioners. In the event the majority of the commissioners notify said oil and gas supervisor in writing before the expiration of ten days from the date of said notice that the appointment of said field deputy is disapproved by them, then and in that event said field deputy shall not be appointed, but said oil and gas supervisor must appoint some other individual as in this section provided. Each field deputy shall maintain an office in the district for which he is appointed, convenient of access to the petroleum and gas operators therein. The office shall be open and the deputy shall be present at certain specified times which shall be posted at such office. (As amended in 1917. In force July 28, 1917.)

§ 6. Collection of information.

Sec. 6. It shall be the duty of each deputy to collect all necessary information regarding the oil wells in the district, with a view to determining the presence and source of water in the oil sand, and to make all maps and other accessories necessary to determine the presence and source of water in the oil sands. This work shall be done with the view to advising the operators as to the best means of protecting the oil and gas sands, and with a view to aiding the supervisor in ordering tests or repair work at wells. All such data shall be kept on file in the office of the deputy oil and gas supervisor of the respective district.

§ 7. Records and their use.

Sec. 7. The records of any and all operators, when filed with the deputy supervisor as hereinafter provided, shall be open to inspection to those authorized in writing by such operators, to the state officers, and to the board of commissioners hereinafter provided for. Such records shall in no case other than those hereinafter and in this section provided, be available as evidence in court proceedings and no officer or employee or member of any board of commissioners shall be allowed to give testimony as to the contents of said records, except at such court proceedings as are hereinafter provided for in the review of the decision of the state oil and gas supervisor, or a board of commissioners, or in any proceedings initiated for the enforcement of an order of the supervisor, or any proceeding initiated for the enforcement of a lien created by this act, or any proceeding for the collection of the assessment levied under and pursuant to the provisions of this act or in criminal proceedings arising out of such records, or the statements upon which they are based. (As amended in 1917. In force July 28, 1917.)

§ 8. Order by supervisors.—Agents of operators.

Sec. 8. It shall be the duty of the supervisor to order such tests or remedial work as in his judgment are necessary to protect the petroleum and gas deposits from damage by underground water, to the best interests of the neighboring property owners, and the public at large.

The order shall be in written form, signed by the supervisor, and shall be served upon the owner of the well, or the local agent appointed by such owner, either personally or by mailing a copy of said order to the post-office address given at the time the local agent is designated, or if no such local agent has been designated, by mailing a copy of said order to the last known post-office address of said owner, or if the owner be unknown by posting a copy of said order in a conspicuous place upon the property, and publishing the same in some newspaper of general circulation throughout the county in which said well is located, once a week for two successive weeks.

Said order shall specify the condition sought to be remedied

and the work necessary to protect such deposits from damage from underground waters. For this purpose each operator or owner shall designate an agent, giving his post-office address, who resides within the county where the well or wells are located, upon whom all orders and notices provided for in this act may be served. (As amended in 1917. In force July 28, 1917.)

§ 9. Rejection of supervisor's orders.

Sec. 9. The well owner or his local agent may within ten days from the date of service of any order from the supervisor file with the supervisor or his deputy in the district where the property is located, a statement that the supervisor's order is not acceptable and that appeal from said order is taken to the board of commissioners. Such appeal shall operate as a stay of any order issued under or pursuant to the provisions of this act. (As amended in 1917. In force July 28, 1917.)

§ 10. Arbitration.

Sec. 10. For the purposes of this act the state shall be divided into five districts, as follows:

District No. 1, including the counties of Los Angeles, Riverside, Orange, San Diego, Imperial and San Bernardino.

District No. 2, the county of Ventura.

District No. 3, including the counties of Santa Barbara, San Luis Obispo, Monterey, Santa Cruz, San Benito, Santa Clara, Contra Costa, San Mateo, Alameda and San Francisco.

District No. 4, including the counties of Tulare, Inyo and Kern.

District No. 5, including the counties of Fresno, Madera, Kings, Mono, Mariposa, Merced and all other counties in California not included in any of said other districts.

There shall be elected at the times and in the manner hereinafter provided, district oil and gas commissioners for each such district, as follows:

For district No. 1, five; for district No. 2, five; for district No. 3, five; for district number 4, seven; for district No. 5, five.

Said district oil and gas commissioners shall be elected by vote of the companies, individuals, copartnerships or associations,

who shall have been assessed, and whose names shall appear on the last record of assessments (next preceding such election) for and on account of the fund in this act provided to be raised, within said districts respectively, said vote to be taken at a meeting to be held in each of said districts respectively, and on the third Monday in September of each year, such place and the time and details of such meeting to be fixed by the state oil and gas supervisor, and of which meeting at least two weeks' previous notice shall have been given by letter addressed to each of said persons, corporations, copartnerships and associations, entitled to vote as aforesaid, at his or its post-office address or principal place of business.

At said meeting each of those entitled to vote as herein provided may be represented by one person holding the written authority of such voter to act for him at such meeting.

At said meeting each voter shall be entitled to one vote for each member of the board of district oil and gas commissioners who are required to be selected for such district. In addition thereto, in each district in which five commissioners are to be elected, each voter shall be entitled, for each one hundred dollars, or fraction thereof, which said voter shall have paid in accordance with his last assessment hereunder, to cast one vote for the two commissioners who are elected for three years; and in each district in which seven commissioners are to be elected, each voter shall be entitled, for each one hundred dollars, or fraction thereof, which said voter shall have paid in accordance with his last assessment hereunder, to cast one vote for the three commissioners who are elected for three years. In all subsequent elections the qualification of voters in the election of a commissioner shall be the same as in the election of the commissioner whose successor in office is being elected.

Said meeting shall select by ballot, by a majority vote of the votes represented, the number of persons as hereinbefore specified to act as district oil and gas commissioners for such district.

In any district entitled to seven commissioners, two shall be chosen for a term of one year, two for two years and three for three years. In any district entitled to five commissioners, one

shall be chosen for a term of one year, two for two years and two for three years.

The chairman and secretary of the meeting shall issue a written certificate to the state oil and gas supervisor, setting forth the result of such election, and the name and address of each of the persons elected at said meeting as the district oil and gas commissioners for said district and the term for which each has been elected. No person shall be eligible as a district oil and gas commissioner who is not a resident of the district for which he is elected, nor shall any person be eligible for such position who is not actually engaged in the business of oil or gas development or production, within the district.

Upon receipt of the certificate so made by the chairman and secretary of any such meeting, the state oil and gas supervisor shall issue a certificate of election to the respective persons in said certificate named as the district oil and gas commissioners for said district, and for the periods of one, two or three years from and after the first Monday in October, 1917, as shall be shown in such certificate, and until their respective successors shall have been elected.

Within thirty days after their appointment by the state oil and gas supervisor, the district oil and gas commissioners for each district shall meet at a time and place within the district to be designated by the state oil and gas supervisor, and shall thereupon select one of the number as chairman.

The deputy supervisor of the district shall be ex officio secretary of said board, and shall keep a record of its proceedings, and his office shall be the office of the commissioners.

Said commissioners shall serve without compensation, except their necessary traveling expenses. The traveling expenses of said commissioners and all actual expenses incurred by or under order of said commissioners in the hearing and determination and carrying out of orders appealed to them, shall be certified to said state supervisor, and when audited by him and by the state board of control shall be paid from said fund.

On the third Tuesday in September of each year at an hour and places in said respective districts to be fixed by the state oil and gas supervisor, and of which notices shall have been given as hereinbefore specified, the successor of each of the district oil and gas commissioners whose term of appointment

shall expire that year, shall be elected and qualified in the manner and subject to the provisions hereinbefore set forth, and the term of each shall be for a period of three years from and after the first Monday in October next succeeding.

All, either or any of the district oil and gas commissioners elected in any district may be recalled by the votes of a majority of the qualified votes of the district entitled to vote as to such commissioners respectively. In case there shall be filed in the office of the state oil and gas supervisor, a written petition, signed by not less than forty per cent of those entitled to vote as to the election of any commissioner or commissioners, asking the recall of such commissioner or commissioners, said state oil and gas supervisor shall, within ten days thereafter, order and give notice of, a special election in such district to fill the office or offices of the commissioner or commissioners named in said petition for recall; and shall cause notice to be given of said election in the manner, and for the time required for regular election, and said notice shall fix the time and place of such election.

At such election, the commissioner or commissioners named in such petition for recall shall be voted upon as though candidates for election for the unexpired portion of the term for which they, respectively, were originally elected, and any other candidate or candidates may, at the same time, be voted upon. It shall require a majority of all the qualified votes entitled to vote for such commissioners, respectively, to constitute an election. In case less than a majority of all qualified votes shall be cast for any candidate, said recall shall be deemed to have failed as to the commissioner concerning whose office such vote was taken; and in case such commissioner himself shall receive a majority of the votes, said recall shall be deemed to have failed, and in either of such cases, such commissioner shall continue to serve until the expiration of his term as though no such special election had been held. But in case any person other than such commissioner shall receive a majority of the votes for such unexpired term, then such recall shall become effective, and the office of the commissioner so recalled shall be vacant and upon written certificate of such election being filed with the state oil and gas supervisor, the person so chosen and elected for such unexpired term shall

become the successor of the commissioner so recalled, and a certificate of his election for such unexpired term shall be issued and transmitted to him by the state oil and gas supervisor. And like proceedings shall be had in case more than one commissioner shall be included in said petition for recall.

In all recall elections, qualifications for voters and the numbers of votes which they will be entitled to cast shall be the same as they respectively were in the election of the commissioner as to whom such recall election is being held.

In case of vacancy caused by the death, resignation or removal from district or ceasing to be engaged in the business of development or production of oil or gas in the district as to the office of any commissioner, such vacancy shall be filled until the next annual election by the state oil and gas supervisor, who shall appoint to fill such vacancy an eligible person, nominated in writing by the remaining commissioners of such district.

Upon any subject in which any commissioner is personally interested, or upon which any corporation, copartnership, association or individual by whom he is employed is directly interested as a party, such commissioner shall not be entitled to sit or vote.

The board of commissioners shall be entitled to call upon the supervisor for advice, and written report upon any matter referred to the board of commissioners, and the supervisor shall be entitled to call meetings of the commissioners at the office of the field supervisor, upon five days' written notice, to obtain their written advice upon any matters relating to his work within their district. (As amended in 1917. In force July 28, 1917.)

§ 11. Complaints.

Sec. 11. Upon receipt by the supervisor or deputy supervisor of a written complaint specifically setting forth the condition complained against, signed by a person, firm, corporation or association owning land or operating wells within a radius of one mile of any well or group of wells complained against, or upon the written complaint specifically setting forth the condition complained against, signed by any one of the board of commissioners for the district in which said well or group of wells complained against is situated, the supervisor

must make an investigation of said well or wells and render a written report stating the work required to repair the damage complained of, or stating that no work is required. A copy of said order must be delivered to the complainant, or if more than one, each of said complainants, and if the supervisor order the damage repaired, a copy of such order shall be delivered to each of the owners, operators or agents having in charge the well or wells upon which the work is to be done. Said order shall contain a statement of the conditions sought to be remedied or repaired and a statement of the work required by the supervisor to repair such condition. Service of such copies shall be made by mailing to such persons at the post-office address given. (As amended in 1917. In force July 28, 1917.)

§ 12. Testimony.

Sec. 12. In any proceeding before the board of commissioners as herein provided, or in any other proceeding or proceedings instituted by the supervisor for the purpose of enforcing or carrying out the provisions of this act, or for the purpose of holding an investigation to ascertain the condition of any well or wells complained of, or which in the opinion of the supervisor may reasonably be presumed to be improperly drilled, operated, maintained or conducted, the supervisor and the chairman of the board of commissioners shall have the power to administer oaths and may apply to a judge of the superior court of the State of California, in and for the county in which said proceeding or investigation is pending, for a subpoena for witnesses to attend at said proceeding or investigation. Upon said application of said supervisor or said chairman of said board of commissioners, said judge of said superior court must issue a subpoena directing said witness to attend said proceeding or investigation; *provided, however,* that no person shall be required to attend upon such proceeding, either with or without such books, papers, documents or accounts unless residing within the same county or within thirty miles of the place of attendance. But the supervisor or the chairman of the board of commissioners may in such case cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like

depositions in civil actions in superior courts of this state, and to that end may, upon application to a judge of the superior court of the county within which said proceeding or investigation is pending, obtain a subpoena compelling the attendance of witnesses and the production of books, papers and documents at such places as he may designate within the limits hereinbefore prescribed. Witnesses shall be entitled to receive the fees and mileage fixed by law in civil causes, payable from the fund hereinafter created. In case of failure or neglect on the part of any person to comply with any order of the supervisor as hereinbefore provided, or any subpoena, or upon the refusal of any witness to testify to any matter regarding which he may lawfully be interrogated, or upon refusal or neglect to appear and attend at any proceeding or hearing on the day specified, after having received a written notice of not less than ten days prior to such proceeding or hearing, or upon his failure, refusal or neglect to produce books, papers or documents as demanded in said order or subpoena upon such day, such failure, refusal or neglect shall constitute a misdemeanor and each day's further failure, refusal or neglect shall be and be deemed to be a separate and distinct offense, and it is hereby made the duty of the district attorney of the county in which said proceeding, hearing or investigation is to be held, to prosecute all persons guilty of violating this section by continuous prosecution until such person appears or attends or produces such books, papers or documents or complies with said subpoena or order of the supervisor or chairman of the board of commissioners. (As amended in 1917. In force July 28, 1917.)

§ 13. Final decision.

Sec. 13. Within ten days after hearing the evidence, the board of commissioners must make a written decision with respect to the order appealed from, and in case the same is affirmed or modified, shall retain jurisdiction thereof until such time as the work ordered to be done by such order shall be finally completed. This written decision shall be served upon the owner or his agent and shall supersede the previous order of the supervisor. In case no written decision be made by said board of commissioners within thirty days after the date of notice by the supervisor as provided in section ten

hereof, the order of the supervisor shall be effective and subject only to review by writ of certiorari from the superior court as provided in section fourteen hereof. (As amended in 1917. In force July 28, 1917.)

§ 14. Repairs of wells.

Sec. 14. On or before thirty days after the date of serving an order of the supervisor, provided for in section eight hereof, or in case of appeal to the board of commissioners, on or before thirty days after date of serving the decision of the board, as provided in sections twelve and thirteen hereof, or in the event review be taken of the order of the board of commissioners within ten days after affirmance of such order, the owner shall commence in good faith the work ordered and continue until completion. If the work has not been so commenced and continued to completion, the supervisor shall appoint agents as he deems necessary who shall enter the premises and perform the work. Accurate account of such expenditures shall be kept and the amount paid from the fund hereinafter created upon the warrant of the state controller. Any amount so expended shall constitute a lien against the property upon which the work is done. The decision of the board of commissioners in such case may be reviewed by writ of certiorari from the superior court of the county in which the district is situated, if taken within ten days after the service of the order upon said owner, operator or agent of said owner or operator as herein provided; or within ten days after decision by the board of commissioners upon petitions by the supervisor. Such writ shall be made returnable not later than ten days after the issuance thereof and shall direct the district board of oil and gas commissioners to certify their record in the cause to such court. On the return day the cause shall be heard by the court unless for good cause the same be continued, but no continuance shall be permitted for a longer period than thirty days. No new or additional evidence shall be introduced in the court before the cause shall be heard upon the record of the district board of oil and gas commissioners. The review shall not be extended further than to determine whether or not

1. The commission acted without or in excess of its jurisdiction.

2. The order, decision or award was procured by fraud.

3. The order, decision, rule or regulation is unreasonable.

4. The order, decision, regulation or award is clearly unsupported by the evidence.

If no review be taken within ten days, or if taken in case the decision of the board is affirmed, the lien upon the property shall be enforced in the same manner as the other liens on real property are enforced, and shall first be enforced against the owner of the well, against the operator and against the personal property and fixtures used in the construction or operation thereof, and then if there be any deficiency against the land upon which the work is done, upon the request of the supervisor, the state controller must, in the manner provided in section forty-four of this act, bring an action for the enforcement of said lien. (As amended in 1917. In force July 28, 1917.)

§ 15. Casing.—Water shut off.

Sec. 15. It shall be the duty of the owner of any well now drilled, or that may be drilled in the State of California, on lands producing or reasonably presumed to contain petroleum or gas, to properly case such well or wells with metal casing, in accordance with methods approved by the supervisor, and to use every effort and endeavor in accordance with the most approved methods to effectually shut off all water overlying or underlying the oil or gas-bearing strata, and to effectually prevent any water from penetrating such oil or gas-bearing strata.

Whenever it appears to the supervisor that any water is penetrating oil or gas-bearing strata, he may order a test of water shut-off and designate a day upon which the same shall be held. Said order shall be in written form and served upon the owner of said well at least ten days prior to the day designated in said order as the day upon which said shut-off test shall be held. Upon the receipt of such order it shall be the duty of the owner to hold said test in the manner and at the time prescribed in said order. (As amended in 1917. In force April 28, 1917.)

§ 16. Abandonment of well.

Sec. 16. It shall be the duty of the owner of any well referred to in this act, before abandoning the same, or before removing the rig, derrick or other operating structure therefrom, or removing any portion of the casing therefrom, to use every effort and endeavor in accordance with methods approved by the supervisor, to shut off and exclude all water from entering oil-bearing strata encountered in the well. Before any well is abandoned the owner shall give written notice to the supervisor, or his local deputy, of his intention to abandon such well and of his intention to remove the derrick or any portion of the casing from such well and the date upon which such work of abandonment or removal shall begin. The notice shall be given to the supervisor, or his local deputy, at least five days before such proposed abandonment or removal. The owner shall furnish the supervisor, or his deputy with such information as he may request showing the condition of the well and proposed method of abandonment or removal. The supervisor, or his deputy, shall before the proposed date of abandonment or removal, furnish the owner with a written order of approval of his proposal or a written order stating what work will be necessary before approval, to abandon or remove will be given. If the supervisor shall fail within the specified time to give the owner a written order such failure shall be considered as an approval of the owner's proposal to abandon the well, or to remove the rig or casing therefrom. (As amended in 1917. In force April 28, 1917.)

§ 17. Commencement of drilling.

Sec. 17. The owner or operator of any well referred to in this act shall, before commencing the work of drilling an oil or gas well, file with the supervisor, or his local deputy, a written notice of intention to commence drilling. Such notice shall also contain the following information: (1) Statement of location and elevation above sea level of the floor of the proposed derrick and drill rig; (2) the number or other designation by which such well shall be known, which number or designation shall not be changed after filing the notice

provided for in this section, without the written consent of the supervisor being obtained therefor; (3) the owner's or operator's estimate of the depth of the point at which water will be shut off, together with the method by which such shut-off is intended to be made and the size and weight of casing to be used; (4) the owner's or operator's estimate of the depth at which oil or gas producing sand or formation will be encountered.

After the completion of any well the provisions of this section shall also apply, as far as may be, to the deepening or redrilling of any well, or any operation involving the plugging of any well or any operations permanently altering in any manner the casing of any well; *and provided, further,* that the number or designation by which any well heretofore drilled has been known, shall not be changed without first obtaining a written consent of the supervisor. (As amended in 1917. In force July 28, 1917.)

§ 18. Log of well.

Sec. 18. It shall be the duty of the owner or operator of any well referred to in this act, to keep a careful and accurate log of the drilling of such well, such log to show the character and depth of the formation passed through or encountered in the drilling of such well, and particularly to show the location and depth of the water-bearing strata, together with the character of the water encountered from time to time (so far as ascertained) and to show at what point such water was shut off, if at all, and if not, to so state in such log, and show completely the amounts, kinds and size of casing used, and show the depth at which oil-bearing strata are encountered, the depth and character of same, and whether all water overlying and underlying such oil-bearing strata was successfully and permanently shut off so as to prevent the percolation or penetration into such oil-bearing strata; such log shall be kept in the local office of the owner or operator, and together with the tour reports of said owner or operator, shall be subject, during business hours, to the inspection of the supervisor, or any of his deputies, or any of the commissioners of the district, except in the case of a prospect well as hereinafter defined.

Upon the completion of any well, or upon the suspension of operations upon any well, for a period of six months if it be a prospect well, or for thirty days, if it be in proven territory, a copy of said log in duplicate, and in such form as the supervisor may direct, shall be filed within ten days after such completion, or after the expiration of said thirty-day period, with the field supervisor, and a like copy shall be filed upon the completion of any additional work in the deepening of any such well.

The state oil and gas supervisor shall determine and designate what wells are prospect wells within the meaning of this act, and no reports shall be required from such prospect wells until six months after the completion thereof.

The owner or operator of any well drilled previous to the enactment of this act shall furnish to the supervisor or his deputy a complete and correct log in duplicate and in such form as the supervisor may direct, or his deputy, of such well, so far as may be possible, together with a statement of the present condition of said well. (As amended in 1917. In force July 28, 1917.)

§ 19. Test of shut-off.

Sec. 19. It shall be the duty of the owner or operator of any well referred to in this act to notify the deputy supervisor of the time at which the owner or operator shall test the shut-off of water in any such well. Such notice shall be given at least five days before such test. The deputy supervisor or an inspector designated by the supervisor shall be present at such test and shall render a report in writing of the result thereof to the supervisors, a duplicate of which shall be delivered to the owner. If any test shall be unsatisfactory to the supervisor he shall so notify the owner or operator in said report, and shall within five days after the completion of such test, order additional tests of such work as he deems necessary to properly shut off the water in such well and in such order shall designate a day upon which the owner or operator shall again test the shut-off of water in any such well, which day may, upon the application of the owner, be changed from time to time in the discretion of the deputy supervisor. (As amended in 1917. In force July 28, 1917.)

§ 20. Production reports.

Sec. 20. It shall be the duty of every person, association or corporation producing oil in the State of California, to file with the supervisor, at his request, but not oftener than once in each month, a statement showing amount of oil produced during the period indicated from each well, together with its gravity and the amount of water produced from each well, estimated in accordance with methods approved by the supervisor, and the number of days during which fluid was produced from each well, the number of wells drilling, producing, idle or abandoned, owned or operated by said person, association or corporation; *provided*, that, upon request and satisfactory showing a longer interval may be fixed by the state oil and gas supervisor as to such reports in the case of any specific owner or operator.

This information shall be in such form as the supervisor may designate. (As amended in 1917. In force July 28, 1917.)

§ 21. Penalty.

Sec. 21. Any owner or operator of a well referred to in this act, or employee thereof, who refuses to permit the supervisor, or his deputy, to inspect the same, or who wilfully hinders or delays the enforcement of this act, and every person, firm or corporation who violates any provision of this act is guilty of a misdemeanor and shall be punishable by a fine of not less than one hundred dollars, or by imprisonment in the county jail for not less than thirty days, or by both such fine and imprisonment.

§ 21a. Charges levied to protect deposits of oil and gas.

Sec. 21a. The charges hereinafter provided for are directed to be levied by the State of California as necessary in the exercise of its police power and to provide a means by which to supervise and protect deposits of petroleum and gas within the State of California, in which deposits the people of the State of California are hereby declared to have a primary and supreme interest. (As amended in 1917. In force July 28, 1917.)

§ 22. Charges assessed.

Sec. 22. Charges levied, assessed and collected as hereinafter provided upon the properties of every person, firm, corporation or association operating any well or wells for the production of petroleum in this state, or operating any well or wells for the production of natural gas in this state which gas wells are situate on lands situate within two miles, as near as may be, of any petroleum or gas well, the production of which is chargeable under this act, shall be used exclusively for the support and maintenance of the department of petroleum and gas hereinbefore created, and shall be assessed and levied by the state mineralogist, and collected in the manner hereinafter provided. (As amended in 1917. In force July 28, 1917.)

§ 23. Charges on oil.

Sec. 23. Every person, firm, corporation or association operating any petroleum well or wells in this state shall annually pay a charge to the state treasurer at a uniform rate per barrel of petroleum produced for the preceding calendar year at the time and in the manner hereinafter provided, based upon a verified report as herein provided.

§ 24. Charges on gas.

Sec. 24. Every person, firm, corporation or association operating any gas well or wells in this state shall annually pay a charge to the state treasurer based upon the amount of gas sold in the preceding calendar year, at a fixed rate per thousand cubic feet, at the times and in the manner hereinafter provided, based upon a verified report as herein provided. (As amended in 1917. In force July 28, 1917.)

§ 25. Charges on land.

Sec. 25. Every person, firm, corporation or association owning any oil land, as determined by the supervisor, shall annually pay a charge to the state treasurer at the time and in the manner

hereinafter provided, which charge shall be a uniform rate per acre. Said charge shall be based upon a verified report as provided herein; *provided, however,* that such lands so assessed shall not be called upon to pay more than one-tenth of the total charges or moneys proposed to be assessed, levied and collected under the provisions of this act for any one year.

§ 26. Additional charges.

Sec. 26. The charges assessed, levied and to be collected under the provisions of this act shall be in addition to any and all charges, taxes, assessments or licenses of any kind or nature paid by or upon the properties assessed hereunder.

§ 27. Annual financial estimate.

Sec. 27. The state mineralogist shall annually, on or before the first Monday in March, acting in conjunction with the state board of control, make an estimate of the amount of moneys which shall be required to carry out the provisions of this act.

At the time of making such estimate, the state mineralogist shall report to the state board of control the amount of money in the petroleum and gas fund on the day such estimate is made, less the amount of money necessary for the support of the department of petroleum and gas for the remainder of the fiscal year, and the amount of such estimate shall in no event exceed the difference between the amount thus determined as remaining in the petroleum and gas fund at the end of the fiscal year and the sum of one hundred fifty thousand dollars. (As amended in 1917. In force July 28, 1917.)

§ 28. Reports by owners.

Sec. 28. The state mineralogist shall prescribe the form and contents of all reports for making the charge or other purposes to carry out the intent and provision of this act, which form shall be mailed in duplicate to the person, firm, corporation or association owning property or assessed under the provisions of this act.

§ 29. Annual report.

Sec. 29. Every person, firm, corporation or association chargeable under the provisions of this act shall within ten days after the first Monday in March of each year, report to and file with the state mineralogist a report in such form as said officer may prescribe, giving any and all items of information as may be demanded by said report, and necessary to carry out the provisions of this act, which report shall be verified by such person or officer as the state mineralogist may designate.

§ 30. Failure to report.

Sec. 30. If any person, firm, corporation or association chargeable under the provisions of this act shall fail or refuse to furnish the state mineralogist within the time prescribed in this act the verified report provided for in this act, the state mineralogist must note such failure or refusal in the record of assessments hereinafter in this act provided for, and must make an estimate of the petroleum or gas production, or landed area to be assessed of any such person, firm, corporation or association and must assess the same at the amount thus estimated and compute the charge thereon, which assessment and charge shall be the assessment and charge for such year. And if in the succeeding year any such person, firm, corporation or association shall again fail and refuse to furnish the verified report required by this act, the state mineralogist shall make an estimate as aforesaid, which estimate shall not be less than twice the amount of the estimate made by him for the previous year, and shall note such failure or refusal as above provided, and the said estimate so made shall be the assessment or charge for said year. In case of each succeeding consecutive failure or refusal the said state mineralogist shall follow the same procedure until a true statement or report shall be furnished.

§ 31. Penalty.

Sec. 31. Any person, firm, corporation or association failing or refusing to make or furnish any report which may be required pursuant to the provisions of this act, or who wilfully renders a false or fraudulent report, shall be guilty of a mis-

demeanor and subject to a fine of not less than three hundred dollars, nor more than one thousand dollars, or by imprisonment in the county jail not exceeding six months, or both such fine and imprisonment for each such offense. (As amended in 1917. In force July 28, 1917.)

§ 32. Extending time for report.

Sec. 32. The state mineralogist may, for good cause shown, by order entered upon his minutes, extend for not exceeding thirty days, the time fixed in this act for filing any report herein provided for.

§ 33. Rate of assessment.

Sec. 33. On or before the third Monday before the first Monday in July of each year, the state mineralogist shall determine the rate or rates which shall produce the sums necessary to be raised as provided in section twenty-seven of this act. Within the same time the said state mineralogist shall extend into the proper column of the record of assessments hereinafter provided for, the amount of charges due from each person, firm, corporation or association. (As amended in 1916. In force July 28, 1917.)

§ 34. Assessment, when made.

Sec. 34. Between the first Monday in March and the third Monday before the first Monday in July in each year, the state mineralogist must assess and levy the charges as and in the manner provided for in this act. The assessments must be made to the person, firm, corporation or association owning or operating the property subject to assessment hereunder on the first Monday in March. If the name of the owner is unknown to the state mineralogist, such assessment must be made to unknown owners. Clerical errors occurring or appearing in the name of any person, firm, corporation or association whose property is properly assessed and charged, or in the making, or extension of any assessment or charge upon the records, which do not affect the substantial rights of the payer, shall not invalidate the assessment or charge.

§ 35. Equalization.

Sec. 35. The state mineralogist and the chairman of the state board of control and the chairman of the state board of equalization shall constitute a board of review, correction and equalization, and shall have all the powers and perform such duties as usually devolve upon a county board of equalization under the provisions of section three thousand six hundred seventy-two of the Political Code. The state mineralogist shall act as secretary of said board, and shall keep an accurate minute of the proceedings thereof. Said board of review, correction and equalization shall meet at the state capitol on the third Monday before the first Monday in July of each year, and remain in session from day to day until the first Monday in July for the purpose of carrying out the provisions of this section.

§ 36. Publication of assessment notice.

Sec. 36. On the third Monday before the first Monday in July of each year the state mineralogist shall cause to be published a notice, one or more times, in a daily, or weekly, or semiweekly newspaper of general circulation published in the counties of Fresno, Kern, Los Angeles, Orange, Ventura and Santa Barbara, and such other counties as may contain lands or produce oil or gas charged under and pursuant to the terms and provisions of this act, if one be published therein, otherwise in a newspaper of general circulation published in the county nearest to such county designated herein in which no such paper is published, that the assessment of property and levy of charges under and in pursuance of this act has been completed and that the records of assessments containing the charges due will be delivered to the state controller on the first Monday in July, and that if any person, firm, corporation or association is dissatisfied with the assessment made or charge fixed by the state mineralogist, he or it may, at any time before said first Monday in July, apply to said board of review, correction and equalization to have the same corrected in any particular. The said board shall have the power at any time before said first Monday in July to correct the record of assessments and may increase or decrease any assessment or charge therein if in its judgment the evidence presented or obtained

warrants such action. Costs of such publication in any county shall be paid from the petroleum and gas fund; *provided, however,* that the omission to publish said notice as hereinbefore and in this section provided, shall not affect the validity of any assessment levied under or pursuant to the provisions of this act. (As amended in 1917. In force July 28, 1917.)

§ 37. Record of assessment.

Sec. 37. The state mineralogist must prepare each year a book in one or more volumes, to be called the "Record of assessments and charges for the petroleum and gas fund," in which must be entered, either in writing or printing, or both writing and printing, each assessment and levy or charge made by him upon the property provided to be assessed and charged under this act, describing the property assessed, and such assessments may be classified and entered in such separate parts of said record as said state mineralogist shall prescribe. (As amended in 1917. In force July 28, 1917.)

§ 38. Certificate of state mineralogist.

Sec. 38. On the first Monday in July the state mineralogist must deliver to the state controller the record of assessments and charges for the petroleum and gas fund, certified to by said state mineralogist, which certificate shall be substantially as follows: "I, ..., state mineralogist, do hereby certify that between the first Monday in March and the first Monday in July, 19...., I made diligent inquiry and examination to ascertain all property and persons, firms, corporations and associations subject to assessment for the purpose of the petroleum and gas fund as required by the provisions of the act of legislature approved June 10, 1915, providing for the assessment and collection of charges for oil protection; that I have faithfully complied with all the duties imposed upon me by law; that I have not imposed any unjust or double assessment through malice or ill will, or otherwise; nor allowed any person, firm, corporation or association or property to escape a just assessment or charge through favor or regard, or otherwise." But the failure to subscribe such certificate to such record of assessments and charges for oil protection, or

any certificate, shall not in any manner affect the validity of any assessment or charge. (As amended in 1917. In force July 28, 1917.)

§ 39. Payment of charges.

Sec. 39. The charges levied and assessed under the provisions of this act shall be due and payable on the first Monday in July in each year, and one-half thereof shall be delinquent on the sixth Monday after the first Monday in July at six o'clock p. m. and unless paid prior thereto, fifteen per cent shall be added to the amount thereof, and unless paid prior to the first Monday in February next thereafter at six o'clock p. m., an additional five per cent shall be added to the amount thereof, and the unpaid portion, or the remaining one-half of said charges shall become delinquent on the first Monday in February next succeeding, the day upon which they become due and payable, at six o'clock p. m.; and if not paid prior thereto five per cent shall be added to the amount thereof.

§ 40. Publication of notice of payment of dues.

Sec. 40. Within ten days after the receipt of the record of assessments and charges for oil protection, the state controller must begin the publication of a notice to appear daily for five days, in one daily newspaper of general circulation published in each of the counties of Fresno, Kern, Los Angeles, Orange, Ventura and Santa Barbara, and such other counties as may contain lands or produce oil or gas charged under or pursuant to the terms and provisions of this act, if one be published therein, otherwise for at least two times in a weekly or semiweekly paper of general circulation published therein, or if there be neither a daily nor weekly nor semiweekly paper of general circulation published in any one of such counties, then the publication of the notice for such county shall be made in a similar manner in a newspaper of general circulation published in the county nearest such county, specifying: (1) That he has received from the state mineralogist the record of assessments and charges for oil protection; (2) that the charges therein assessed and levied are due and payable on the first Monday in July and that one-half thereof will be

delinquent on the sixth Monday after the first Monday in July at six o'clock p. m., and that unless paid to the state treasurer at the capital prior thereto, fifteen per cent will be added to the amount thereof, and unless paid prior to the first Monday in February next thereafter at six o'clock p. m., and additional five per cent will be added to the amount thereof; and that the remaining one-half of said charges will become delinquent on the first Monday in February next succeeding the day upon which they become due and payable, at six o'clock p. m., and if not paid to the state treasurer at the capital prior thereto, five per cent will be added to the amount thereof. Costs of such publication in any county shall be paid from the petroleum and gas fund. (As amended in 1917. In force July 28, 1917.)

§ 41. Charges become lien.

Sec. 41. The assessments and charges levied under the provisions of this act shall constitute a lien upon all the property of every kind and nature belonging to the persons, firms, corporations and associations assessed under the provisions hereof, which lien shall attach on the first Monday in March of each year. Such lien shall be enforced and said charges collected by an action by the state controller as provided in section forty-four of this act. (As amended in 1917. In force July 28, 1917.)

§ 42. Charges payable to treasurer.

Sec. 42. All charges assessed and levied under the provisions of this act shall be paid to the state treasurer upon the order of the state controller. The controller must mark the date of payment of any charge on the record of assessments for the petroleum and gas fund and shall give a receipt for such payment in such form as the controller may prescribe. Errors appearing upon the face of any assessment on said record of assessments or overcharges may be corrected by the controller by and with the consent of the state board of control, in such manner and at such time as said controller and said board shall agree upon. (As amended in 1917. In force July 28, 1917.)

§ 43. Protest of charges.

Sec. 43. Any person, firm, corporation or association claiming and protesting as herein provided that the assessment made or charges assessed against him or it by the state mineralogist is void, in whole or in part, may bring an action against the state treasurer for the recovery of the whole or any part of such charges, penalties or costs paid on such assessment, upon the grounds stated in said protest, but no action may be brought later than the third Monday in February next following the day upon which the charges were due, nor unless such person, firm, corporation or association shall have filed with the state controller at the time of payment of such charges, a written protest stating whether the whole assessment or charge is claimed to be void, or if a part only, what part, and the grounds upon which such claim is founded, and when so paid under protest the payment shall in no case be regarded as voluntary.

Whenever, under the provisions of this section, an action is commenced against the state treasurer, a copy of the complaint and of the summons must be served upon the treasurer, or his deputy. At the time the treasurer demurs or answers, he may demand that the action be tried in the superior court of the county of Sacramento, which demand must be granted. The attorney employed by the state oil and gas supervisor must defend such action; *provided, however,* the said mineralogist may at the request of the said oil and gas supervisor employ additional counsel, the expense of which employment shall be paid from the petroleum and gas fund. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for.

A failure to be in such action within the time herein specified shall be a bar against the recovery of such charges. In any such action the court shall have the power to render judgment for the plaintiff for any part or portion of the charge, penalties, or costs found to be void and so paid by plaintiff upon such assessment. (As amended in 1917. In force July 28, 1917.)

§ 44. Delinquent charges.

Sec. 44. The state controller shall, on or before the thirtieth day of May next following the delinquency of any charge as provided in this act, bring an action in a court of competent jurisdiction, in the name of the people of the State of California, in the county in which the property assessed is situated, to collect any delinquent charges or assessments, together with any penalties or costs, which have not been paid in accordance with the provisions of this act and appearing delinquent upon the records of assessments and charges for the petroleum and gas fund in this action provided for.

The attorney for the state oil and gas supervisor shall commence and prosecute such action to final judgment and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for. The state mineralogist may employ additional counsel to assist the attorney for the state oil and gas supervisor, and the expense of such employment shall be paid from the petroleum and gas fund.

Payments of the penalties and charges, or amount of the judgment recovered in such action must be made to the state treasurer. In such actions the record of assessment and charges for oil protection, or a copy of so much thereof as is applicable in said action, duly certified by the controller showing unpaid charges against any person, firm, corporation or association assessed by the state mineralogist is prima facie evidence of the assessment upon the property, the delinquency, the amount of charges, penalties, and costs due and unpaid to the state, and that the person, firm, corporation or association is indebted to the people of the State of California in the amount of charges and penalties therein appearing unpaid and that all the forms of law in relation to the assessment of such charges have been complied with. (As amended in 1917. In force July 28, 1917.)

§ 45. First assessment, March, 1916.

Sec. 45. The first assessment under the provisions of this act shall be as of the first Monday in March, nineteen hundred sixteen, and the reports of petroleum production and sales of gas

herein provided to be assessed shall be reported for the calendar year ending December thirty-first, nineteen hundred fifteen. The lands herein provided to be assessed and charged shall be assessed to the owners thereof as of the first Monday in March, nineteen hundred sixteen.

§ 46. Disposition of funds.

Sec. 46. All the moneys heretofore paid to the state treasurer under or pursuant to the provisions of this act and deposited to the credit of the oil protection fund, shall be withdrawn from said fund, which is hereby abolished, and deposited to the credit of the petroleum and gas fund which is hereby created. All of the moneys hereafter paid to the state treasurer under or pursuant to the provisions of this act shall be deposited to the credit of the petroleum and gas fund. All moneys in such fund shall be expended under the direction of the state mineralogist, drawn from such fund for the purpose of this act upon warrants drawn by the controller of the state, upon demands made by the state mineralogist, and audited by the state board of control. Of the moneys in said petroleum and gas fund, when such action has been authorized by the state board of control, the state mining bureau may withdraw, without at the time furnishing vouchers and itemized statements, a sum not to exceed five hundred dollars, said sum so drawn to be used as a revolving fund where cash advances are necessary. At the close of each fiscal year, or at any other time, upon demand of the board of control, the moneys so drawn shall be accounted for and substantiated by vouchers and itemized statements submitted to and audited by the board of control. (As amended in 1917. In force July 28, 1917.)

§ 47. Moneys credited to oil fund.

Sec. 47. All moneys received in repayment of repair work done under the order and direction of the supervisor as hereinbefore provided, shall be returned and credited to the petroleum and gas fund. (As amended in 1917. In force July 28, 1917.)

§ 48. Annual report by supervisor.

Sec. 48. On or before the first day of October of each and every year the supervisor shall submit a report in writing to the state mineralogist showing the total number of barrels of petroleum produced in each county in the state during the previous calendar year, together with the total cost of said department for the previous fiscal year and the net amount remaining in the petroleum and gas fund available for the succeeding fiscal year's expense, also the total amount delinquent and uncollected from any assessments or charges levied under or pursuant to the provisions of this act. Such report shall also include such other information as the supervisor may deem advisable. The state mineralogist shall make public such statements promptly after receipt of the same from the supervisor for the benefit of all parties interested therein. (As amended in 1917. In force July 28, 1917.)

§ 49. Recording lease.

Sec. 49. The owner or operator of any lands or tenements subject to assessment under this act shall, within six months after this act goes into effect, file with the supervisor a certificate which shall contain the names of all the parties claiming an interest in or to said lands and full description of the property and the names of all parties in interest where such interest is held by lease, license or assignment. (As amended in 1917. In force July 28, 1917.)

§ 50. Definitions.

Sec. 50. Whenever the term "supervisor" is used in this act it shall be taken to mean the "state oil and gas supervisor," the term "oil" shall include "petroleum," the term "petroleum" shall include "oil," the term "gas" shall mean natural gas coming from the earth, the term "operator" shall mean any person, firm or corporation drilling, maintaining, operating, pumping, or in control of a well in any territory which the supervisor determines to be oil or gas producing territory, the term "owner" shall include "operator" when any oil or gas well is operated or has been operated or is about to be operated by any person,

firm or corporation other than the owner thereof, and the term "operator" shall include "owner" when any such well is or has been or is about to be operated by or under the direction of the owner, except that all the provisions of this act relating to assessments for the purposes of this act based upon the annual production of oil or petroleum or sale of gas, as set forth in sections twenty-two to forty-five, inclusive, of this act, shall apply only to a person, firm or corporation operating an oil or petroleum or gas well, and shall not apply to the owner of such well if some person, firm or corporation, other than such owner, has been actually operating the well during the whole period for which such annual charge is made, but in the event that the actual operation of any such well changes hands during such period, the charge shall be apportioned upon the basis of the oil or petroleum or gas produced, and the lien provided for in section forty-one of this act shall be a lien against the property of each and all such operators.

§ 51. Appropriation first year.

Sec. 51. There is hereby appropriated out of any moneys in the state treasury, not otherwise appropriated, the sum of twenty thousand dollars, which said sum shall be immediately transferred by the state controller on the books of his office from the general fund to the "oil protection fund" created by section forty-six of this act.

The above mentioned fund shall be available for the uses of the state mineralogist for the maintenance of the department of petroleum and gas and for the necessary expenses of the controller in carrying out the provisions of this act. When the collections paid to the state treasurer, as herein provided, equal the sum of thirty thousand dollars then said sum of twenty thousand dollars shall be retransferred from the oil protection fund to the general fund. The moneys received into the state treasury through the provisions of this act are hereby appropriated for the uses and purposes herein specified.

§ 52. Constitutionality.

Sec. 52. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of

this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

§ 53. Incorporated cities.

Sec. 53. This act shall be liberally construed to meet its purposes and the supervisor shall have all powers which may be necessary to carry out the purposes of this act, but the provisions of this act shall not apply to any land or wells situated within the boundaries of an incorporated city where the drilling of oil wells is prohibited.

§ 54. Repeal of previous law.

Sec. 54. That certain act entitled "An act to prevent injury to oil, gas or petroleum-bearing strata or formations by the penetration or infiltration of water therein," approved March 20, 1909, together with all acts amendatory thereof and supplemental thereto and all acts in conflict herewith are hereby repealed. Nothing herein shall be construed as affecting the provisions of the act of June 16, 1913, establishing a state mining bureau.

TO PREVENT WASTING OF NATURAL GAS.

AN ACT prohibiting the unnecessary wasting of natural gas into the atmosphere; providing for the capping or otherwise closing of wells from which natural gas flows; and providing penalties for violating the provisions of this act.

[Approved March 25, 1911.]

The people of the State of California, represented in senate and assembly, do enact as follows:

§ 55. Wasting gas.

Section 1. All persons, firms, corporations and associations are hereby prohibited from wilfully permitting any natural gas wastefully to escape into the atmosphere.

§ 56. Plugging gas well.

Sec. 2. All persons, firms, corporations or associations digging, drilling, excavating, constructing or owning or controlling any well from which natural gas flows shall upon the abandonment of such well, cap or otherwise close the mouth of or entrance to the same in such a manner as to prevent the unnecessary or wasteful escape into the atmosphere of such natural gas. And no person, firm, corporation or association owning or controlling land in which such well or wells are situated shall wilfully permit natural gas flowing from such well or wells, wastefully or unnecessarily to escape into the atmosphere.

§ 57. Penalty.

Sec. 3. Any person, firm, corporation or association who shall wilfully violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

§ 58. "Day" defined.

Sec. 4. For the purposes of this act each day during which natural gas shall be wilfully allowed wastefully or unnecessarily to escape into the atmosphere shall be deemed a separate and distinct violation of this act.

§ 59. Repealing clause.

Sec. 5. All acts or parts of acts in conflict herewith are hereby repealed.

§ 60. Taking effect.

Sec. 6. This act shall take effect immediately.

§ 61. Eminent domain.

The right of eminent domain has been extended to oil pipe lines. (Code of Civil Procedure, 1906, § 1238.)

§ 62. Pipe lines.

Pipe lines are subject to the control of the railroad commissioner. A pipe line is defined as follows:

"(m) The term 'pipe line,' when used in this act, includes all real estate, fixtures and personal property, owned, controlled, operated or managed in connection with or to facilitate the transmission, storage, distribution or delivery of crude oil or other fluid substance except water through pipe lines." (Acts December 23, 1911, p. 18, § 2.)

COLORADO.

GAS AND OIL WELLS.—OIL INSPECTOR.

§ 1. Boring through coal seam.—Notice to oil inspector.
§ 2. Plugging abandoned well.
§ 3. Report on plugged well.
§ 4. Locating well near coal shaft.
§ 5. Well penetrating coal seam, casing.
§ 6. Coal seam, protecting from oil.
§ 7. Casing to exclude water.
§ 8. Report on completed well.
§ 9. Report on abandoned well.
§ 10. Annual report of state oil inspector.
§ 11. Removal of oil inspector.
§ 12. Duty of district attorney.
§ 13. Appointment of oil inspector.
§ 14. Oath and bond.—Deputies.
§ 15. Two deputies.—Qualifications.
§ 16. Salary and fees.
§ 17. Penalties.

[Acts 1915, p. 367.]

AN ACT relating to the production, purity, sale and inspection of kerosene, gasoline and all other fluid substances produced in whole or in part from petroleum, paint, varnish, filler stain, linseed oil, turpentine and all other similar substances; establishing the office of state inspector of oils with officers, assistants, and powers to enforce the provisions of this act; and repealing all acts and parts of acts in conflict herewith.

Be it enacted by the general assembly of the State of Colorado:

§ 1. Boring through coal seam.—Notice to oil inspector.

Sec. 28. It shall be the duty of the owner, owners, or person in charge of any bore hole which shall penetrate any workable coal seam or any accessible or inaccessible coal mine excavation, to notify the state oil inspector of the location of such bore hole by designating the particular five-acre subdivision if the land section on which such bore hole is situated, and the depth and thickness of each and every workable coal seam or accessible or inaccessible coal mine excavation penetrated by such bore hole, and on receipt of such notification the state oil inspector shall at once notify the state coal mine inspector.

§ 2. Plugging abandoned well.

Sec. 29. Whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person or corporation having custody or control of such well at the time of such abandonment and also of the owner or owners of the land whereon such well is situated to properly and securely stop and plug the same, in the following manner, to wit:

There shall be placed in such well, above and below each and every water bearing formation which shall have been encountered, a plug of seasoned wood, the diameter of which shall be not less than one-half inch smaller than the hole of such well where it is to be plugged, such plugs to be not less than five feet in length. The plug which shall be placed below such water bearing formation, shall be properly anchored by ordinary methods, and the plug which shall be placed above such water bearing formation shall be anchored in like manner and the hole immediately above such plug shall be filled for a distance of not less than three feet with finely broken sand, gravel or stone.

A plug of seasoned wood, or other wood obtainable in the vicinity of such well, and not less than five feet long, and of the diameter of the hole, shall be placed in the top of such well, in order to prevent the entrance of surface water.

In the event that for any reason any well or wells shall cease to be operated for the utilization of oil or gas, and it is the

intention of the owners or persons having charge of such well or wells to reopen them at some future time for the utilization of the said oil or gas, the provisions of this act relating to the plugging of wells shall be inoperative, except that it shall be imperative upon the owners or persons having any control of said wells, to adopt such measures as will prevent the oil or gas escaping into the open air until such time as the said well or wells are to be operated and the oil or gas put to some beneficial use.

§ 3. Report on plugged well.

Sec. 31. Whenever any person, persons or corporation have abandoned or ceased any well or wells, as set forth in the immediately preceding section of this act, such person, persons or corporation shall file with the county clerk of the county in which such well or wells are located, a sworn statement setting out the manner in which such well or wells have been plugged, and the date that same were plugged, together with the location of such well or wells, said location to be considered sufficient when shown as being in a specified five-acre subdivision of a designated land section, when the location shall be surveyed lands. When upon unsurveyed lands, the location must be shown on a map of the land section in which it may be situated, with proper metes and bounds to identify it. The said statement to be sworn to by at least two persons who shall have assisted in the actual work of plugging of said well or wells.

§ 4. Locating well near coal shaft.

Sec. 32. No bore hole penetrating a gas-bearing or oil-bearing formation shall be located within two hundred feet of a shaft, or entrance, to a coal mine not definitely abandoned or sealed; nor shall such bore hole be located within one hundred feet of any mine shaft house, mine boiler house, mine engine house or mine fan; and the location of any proposed bore hole must insure that when drilled it will be at least fifteen feet from any mine haulage or airway.

§ 5. Well penetrating coal seam, casing.

Sec. 33. Any bore hole penetrating any workable seam of coal shall be cased by the owner of such bore hole with a suitable casing, conductor or drive pipe, so as to shut off all surface water from entering said workable coal seam.

§ 6. Coal seam, protecting from oil.

Sec. 34. When bore hole for gas or oil are drilled in the coal measures and pass through workable seams if gas or coal is encountered in such bore hole, the coal seams or worked coal seams shall be sufficiently protected by casing so that the gas or oil shall not come in contact with the coal seams or enter the excavations of worked out seams.

§ 7. Casing to exclude water.

Sec. 35. When water-bearing formation is encountered in the drilling of any bore hole for natural gas or oil, casing shall be set upon the next formation encountered which is of such a nature that it will sustain the casing, and exclude all water from the lower bore hole.

§ 8. Report on completed well.

Sec. 36. When a bore hole has been drilled and completed, and placed in operation for the utilization of natural gas or oil, the owner of such well shall file with the inspector a statement of the total depth of the hole, the size and length of casing used and remaining in the hole, the depth and thickness of coal seams penetrated and whether oil, gas or water was obtained.

The information thus given to the inspector shall not be deemed to be public record, and shall be given out by the inspector or his deputies, only upon the written consent of the person, persons or corporation rendering such statement.

§ 9. Report on abandoned well.

Sec. 37. When any oil or gas well is to be abandoned, the owner shall notify the inspector in writing of such intent to abandon and shall proceed with the plugging as provided herein.

(Sec. 38. Sections 28, 32, 33, 34, 35 and 36 apply only to wells or bore holes which may be drilled through workable coal seams.)

§ 10. Annual report of state oil inspector.

Sec. 39. On the first Monday of February of each year the state inspector shall make and deliver to the governor of the state an annual report of the inspections made by him or his deputies for the preceding year.

§ 11. Removal of oil inspector.

Sec. 40. The governor shall have the power to remove from office any inspector who is incompetent or unfaithful in the discharge of his duty, or who having knowledge of the violation of any of the provisions of this act, shall neglect or refuse to prosecute the offender.

§ 12. Duty of district attorneys.

Sec. 41. It shall be the duty of the district attorneys, in their districts and the attorney general, in cases where the district attorney refuses to act, to enforce the provisions of this act by appropriate actions in courts of competent jurisdiction.

§ 13. Appointment of oil inspector.

Sec. 42. The governor shall appoint a skilled and suitable person, who has been qualified by the state civil service examination and who is not interested in the manufacture or dealing in oils, as state inspector of oils.

§ 14. Oath and bond of oil inspector.—Deputy.

Sec. 43. Any person appointed state inspector of oils or deputy inspector of oils shall before entering on the duties of the office take oath or affirmation as prescribed by the constitution of the state and shall file the same in the office of the secretary of state. The state inspector shall execute a bond to the State of Colorado in the sum of ten thousand dollars, which surety shall be approved by the secretary of state, conditioned upon the faithful performance of the duties imposed upon him in the act, and the bond shall be for the use of all persons in any way injured or aggrieved by the act of neglects of said inspectors.

The deputy inspector shall execute a bond to the State of Colorado in the sum of five thousand dollars, which surety shall be approved by the judge of the district court in the county where the said deputy is located, and bond shall also be for the use of all persons in any way aggrieved or injured by the acts of such deputy inspector.

§ 15. Two deputies.—Qualifications.

Sec. 44. There shall be two deputy oil inspectors, one of whom shall be the professor of mechanical engineering of the University of Colorado, and he shall have the supervision and charge of the laboratory and all instruments and appliances therein. It shall be the sole duty of this deputy and his qualified assistants to make all routine analyses of all samples submitted by the chief oil inspector and to give such results in writing as may be necessary for the proper carrying out of the requirements of the act. He shall employ qualified assistants at his own expense.

In case where samples for tests and analysis which do not come under the provisions of the act are submitted by either the state oil inspector or by private parties, a fee may be

charged to cover the laboratory expenses and pay for the time of the deputy and his assistants.

The appointment of the other deputy shall be made by the governor from the civil service eligible list.

§ 16. Salary and fees.

Sec. 45. The sum of four thousand dollars from the fees and emoluments of the office shall be used in the year 1915, towards paying the cost of the erection of a permanent oil laboratory, to be erected upon the campus of the state university, to be the property of the University of Colorado.

Out of the fees emoluments of his office, the state inspector of oils shall receive a salary of sixteen hundred dollars a year and his traveling expenses, not to exceed six hundred dollars per annum, and his deputies shall receive a salary of fifteen hundred dollars a year and traveling or laboratory expenses not to exceed six hundred dollars per annum.

§ 17. Penalties.

Sec. 46. Any violation of any of the provisions of this act shall be deemed a misdemeanor and shall be punished by a fine of not more than five hundred dollars or by imprisonment of not more than six months in the county jail, or by both such fine and imprisonment.

In all cases where fines are collected, one-half the amount shall be paid to the state treasurer and be placed to the credit of the oil inspection department.

Sec. 47. Chapter 121 of the laws of 1899, chapter 200 of the laws of 1907, chapter 180 of the laws of 1911, and all other acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved, April 13, 1915.

TRANSPORTATION OF GAS AND OIL.

§ 1. Incorporation of company.

Whenever any three or more persons associate under the provisions of said Chapter XIX. of the general statutes of the State of Colorado, to form a company, for the purpose of constructing a pipe line for the conveyance of gas, water or oil, they shall in their certificate, in addition to the matters required in section 2 of said Chapter XIX., specify as follows: The places from and to which it is intended to construct the proposed line or lines, and any pipe line company formed under the provisions of said Chapter XIX., shall have the right of way over the line or lines named in the certificate, and shall also have the right to convey gas, water or oil by said lines as stated in such certificate, through lands of the State of Colorado, and lands of individuals, with the right to erect thereon pump stations, storage tanks, and other buildings necessary for such business, and if any such corporation shall be unable to agree with such individuals owning any of such lands for the purchase of any real estate required for the purpose of any such corporation or company, or transportation of the business of the same, or for right of way, or any other lawful purpose connected with or necessary to the operation of said company, such corporation may acquire such title as in manner provided by law. (Act April 9, 1891, p. 94.)

NOTE.—Chapter XIX, relates to the formation of corporations in general.

ILLINOIS.

OIL OR GAS LEASES.

§1. Forfeited leases.—Penalty for failure to release of record.
§2. Actions to compel release.—Judgment.—Costs.

AN ACT for the purpose of compelling oil or gas leases, when forfeited, to be released of record and providing a penalty therefor.

[Acts May 27, 1907; Acts 1907, p. 400.]

§ 1. Forfeited leases—penalty for failure to release of record.

Be it enacted by the People of the State of Illinois, represented in the General Assembly: When any lease on land here-

tofore or hereafter taken for the purpose of prospecting for oil or natural gas or operating oil or gas wells upon lands so leased, shall become forfeited by the terms of said lease or the acts of the lessee, it shall be the duty of the lessee, his, her or their successors or assigns within sixty days from the date this Act shall take effect, if such forfeiture take effect prior thereto and within sixty days from day of forfeiture of any and all other leases, to have such lease or leases released of record in the county where such land is situated, without any cost to the owner or owners of the land, and any failure so to do shall constitute a misdemeanor and shall subject the offender to a fine of not more than two hundred dollars.

§ 2. Actions to compel release.—Judgment.—Costs.

Whenever the lessee of any oil or natural gas lands or the person, firm, company or corporation, only holding or having control of any such lease shall allow the same to become forfeited, or by his, her or their acts shall forfeit the same, and shall refuse, fail or neglect to cause the same to be released of record, the lessor or owner of said lands may begin a civil action to compel said party to release the same of record and upon judgment being rendered decreeing said lease forfeited and directing the release, the said lessee, or his assigns, shall be decreed to pay all costs of such action, including a reasonable attorney fee to be taxed as costs. (Approved May 27, 1907.)

OIL AND GAS WELLS.

§1. Distance of well from mine opening.
§2. Statement and map of well through coal seam.
§3. Abandoned well.—Treatment prescribed.
§4. Affidavit filed with recorder.
§5. Provides for casing.
§6. Violations.—Penalties.
§7. Emergency.

(House Bill No. 546. Approved June 7, 1911.)

AN ACT to amend an Act entitled, "An Act in relation to sinking, filling and operating of oil or gas wells," approved and in force May 16, 1905.

[Acts 1911, p. 426.]

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That an Act entitled, "An Act in relation to sinking, filling and operating of oil or gas wells," approved and in force May 16, 1905, be and the same is hereby amended to read as follows:

§ 1. Distance of well from mine opening.

No oil or gas well shall be drilled hereafter nearer than 250 feet to any opening to a mine used as a means of ingress or egress for the persons employed therein or which is used as an air shaft.

§ 2. Statement and map of well through coal seam.

It shall be the duty of any person, firm or corporation having the custody of the land in which such well is drilled, when the drill hole penetrates a coal seam, to file in the office of the recorder of the county in which said oil or gas well is drilled, a statement and map giving the location and depth of every well so drilled and the county recorder shall file and enter and index same in the records of his office relating to the titles to real property.

§ 3. Abandoned well.—Treatment prescribed.

Before the casing shall be drawn from any well for the purpose of abandonment thereof, which has been drilled into any gas or oil-bearing rock, it shall be the duty of any person, firm or corporation having the custody of such well at the time of such abandonment, and also the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same in the following manner: Such hole first be solidly filled from the bottom thereof to a point at least twenty feet above such gas or oil-bearing rock with sand, gravel or pulvertized rock, immediately on the top of which filling shall be seated a dry wood plug not less than two feet in length, having a diameter of not less than one-fourth of an inch less than the inside diameter of the casing in such well. And above such wooden plug such well shall be solidly filled for at least twenty-five feet with the above-

mentioned filling material, immediately above which shall be seated another wood plug of the same kind and size as above provided, and such well shall again be solidly filled for at least twenty-five feet above such plug with such filling material. After the casing has been drawn from such well there shall immediately be seated at the point where such casing was seated a cast-iron ball or tampered wood plug at least two feet in length, the diameter of which ball or the top of which wood plug shall be greater than that of the hole below where such casing was seated, and above such ball or plug such well shall be solidly filled to top of well with the aforesaid material.

§ 4. Affidavit filed with recorder.

The person, firm or corporation owning or having control or custody of any such well, or the land in which any such well is situated, shall file or cause to be filed in the office of the recorder of the county in which any such well is located, within fifteen days after the same has been plugged, as provided in section 3, the affidavit of at least two persons who were present during the plugging of such well, which affidavit shall be recorded in the record books in the office of the recorder of such county, and shall set out in detail the manner in which such well was plugged and the depth of each such wood plugs and iron ball below the surface of the ground, and the record of such affidavit shall be *prima facie* evidence in any court of a compliance with the provisions of this Act.

§ 5. Provides for casing.

It shall be the duty of any person, firm or corporation sinking a well in any oil or gas-bearing rock, or having sunk such well and maintaining the same, to case off and keep cased off all fresh water from such well.

§ 6. Violations.—Penalties.

Any person, firm or corporation violating the provisions of section 1 or failing to comply with the provisions of section 2 of this Act, or who shall fail or refuse to plug a well in the time and manner provided in section 3 of this Act, or shall fail or neglect to secure and file in the proper recorder's office

the affidavit provided for and required in section 4 of this Act, or shall fail and neglect to properly case off fresh water from such well and keep the same cased off while said well is maintained, as provided in section 5 of this Act, shall be liable to a penalty of one hundred dollars ($100) for each and every violation thereof; and the further sum of one hundred dollars ($100) for each ten days during which such violation shall continue, and all such penalties shall be recoverable in a civil action brought in any court of competent jurisdiction in any county in which said violation occurred, brought in the name of the State of Illinois on the relation of such county, and for the use and benefit of such county, and in all such cases; if there be recovery by the State, it shall recover in addition to such penalties a reasonable attorney's fee.

§ 7. Emergency.

WHEREAS, An emergency exists for the immediate taking effect of this Act, therefore, the same shall be in force and effect from and after its passage. (Approved June 7, 1911.)

INDIANA.

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NOTE.—The figures immediately following a section are the section numbers to the corresponding sections in Burns's Revised Statutes of 1908.

[Acts 1891, p. 379. In force March 9, 1891.]

§ 1. Natural gas supervisor.

That the office of natural gas supervisor is hereby established, and within thirty days after the taking effect of this act the State geologist of Indiana shall appoint a skilled and suitable person, who shall have a practical knowledge of geology and natural gas, and who is not directly or indirectly interested in piping or selling natural gas, as natural gas supervisor of the State of Indiana. Such supervisor shall serve for a term of four years, and until his successor is appointed and qualified, and in case a vacancy occurs in the office of natural gas supervisor from any cause, the state geologist shall fill such vacancy by appointment as herein prescribed: *Provided, however,* The State geologist shall have

power to remove such supervisor at any time for violation or neglect of duty. Such supervisor shall receive an annual salary of twelve hundred dollars, and the further sum of six hundred dollars for traveling and other expenses, and an annual appropriation of eighteen hundred dollars is hereby made out of any moneys in the State treasury not otherwise appropriated for the salary and expenses of such supervisor. The State geologist shall issue to such natural gas supervisor a certificate of appointment, and said supervisor shall, within ten days thereafter, make and execute a bond in the sum of one thousand dollars, payable to the State of Indiana, with his oath of office endorsed thereon, which bond shall be for the faithful performance of duty, and shall be approved by and filed with the Secretary of State. Such supervisor, when he has qualified according to law, shall devote all his time to the business of his office, and he shall work at all times under the direction of the State geologist. He shall make personal inspection of all the gas wells of the State, as far as practicable, and shall see that every precaution is taken to insure the health and safety of workmen engaged in opening gas wells and laying mains and pipes, and of those who, in any manner, use gas for mechanical, manufacturing, domestic or other purposes. He shall see that all the provisions of law pertaining to the drilling of wells and the piping and consumption of natural gas are faithfully carried out, and that the penalties of law are strictly enforced against any person or persons who violate the same, and promptly report all violations of law to the attorney-general of the State. He shall collect and tabulate in his annual report to the State geologist, which shall be made on the second Monday in January of each year, and published in the report of the State geologist, the following facts: The number of gas wells, with location; a record of the geological strata passed through in drilling wells, depth at which salt water is reached in the various wells, and the height to which it rises; the volume of gas produced by each well, so far as it can be ascertained, and also the initial or rock pressure of the same; the increase or decrease in pressure of the various wells, so far as it can be ascertained, and also the increase or decrease in volume of gas produced; the number of miles of mains laid for the transportation of gas, and capacity and cost of the same; the amount of capital

invested in the gas industry, and the number of persons employed in the same; the cost of gas as fuel at the various points at which it is used; the amount of capital invested in manufactories located on account of natural gas, and the number of the same, together with the amount and kind of products and number of employees, and such other facts and information as the State geologist may require. (9056.)

§ 2. Duties.

It shall be the duty of the natural gas supervisor to inspect all natural gas pipe lines in this State, at least once in each year, and as often as may be necessary, or whenever he may be directed by the State geologist; and he shall have the power to condemn any pipes or portions of lines that he may deem unsafe or dangerous to life or property. And any person or persons using, or causing to be used, any pipe lines or portions thereof after the same has been condemned, shall be guilty of a misdemeanor, and upon conviction shall be fined in any court having jurisdiction of misdemeanors, in any sum not exceeding one hundred dollars; and any person or persons in this State owning natural gas wells or natural gas pipe lines, or who controls the same, who refuses to allow the same to be inspected by the natural gas supervisor, upon conviction shall be fined in any sum not exceeding fifty dollars: *Provided, further*, That whenever any responsible person shall file with such gas supervisor an affidavit charging the owner or owners of such gas plant or wells, or any person using the same, or their employes, with the violation of any of the laws regulating the use of natural gas, and particularly specifying the violation complained of, it shall be the duty of such supervisor to examine and inquire into the alleged violation of the law as set forth in the affidavit, and if he finds the facts as charged it shall be his duty to see that the law is complied with. (9058.)

§ 3. Laws repealed.

Section 7 of an act entitled "An act establishing a department of geology and natural resources in the State of Indiana, and providing for a director of the department, abolishing the department of geology and natural history, and the office of

State geologist connected therewith; abolishing the offices of mine inspector and State inspector of oils; repealing all laws or parts of laws in conflict with any of the provisions of this act, and declaring an emergency," passed over the governor's veto, and in force February 26, 1889, is hereby repealed. (9059.)

[Acts 1889, p. 83. In force February 22, 1899.]

§ 4. Leakage, repairing.

That it shall be and is hereby made the duty of the natural gas supervisor of the State of Indiana, upon the discovery of any leak in any pipe line for transportation of natural gas, or in any machinery, apparatus, appliance or device used in the regulation or distribution thereof, to forthwith notify, in writing, the owner or superintendent of said pipe line, machinery, apparatus, appliance or device, to have the same repaired within two days from the time of receipt of said notice. In case such leak has not been repaired within two days from the time of receiving such notice it shall be the duty of said natural gas supervisor to make such repairs as may in his judgment be necessary to stop said leak; and such natural gas supervisor shall have a lien upon said pipe line and all wells with which the same may be connected, for the cost of making such repairs, for the enforcement of which, with all costs of suit, and a reasonable attorney's fee, an action may be maintained by him in any court of competent jurisdiction: and the judgment so obtained shall be collectible without relief from valuation or appraisement laws of the State. In case of any pipe line, machinery, apparatus, appliance or device, owned by a corporation, partnership, or by a non-resident of or absentee from the State of Indiana, the notice herein provided may be served upon any person in charge of such pipe line. (9059.)

[Acts 1891, p. 89. In force March 4, 1891.]

§ 5. Pipes for carrying.—Pressure.

That any person or persons, firm, company or corporation, engaged in drilling for, piping, transporting, using or selling natural gas, may transport or conduct the same through sound wrought or cast-iron castings and pipes tested to at least four

hundred pounds' pressure to the square inch: *Provided,* Such gas shall not be transported through pipes at a pressure exceeding three hundred pounds per square inch: *Provided,* That the provisions of this act shall not affect the costs in any pending litigation. (9060. As amended, Acts 1903, p. 110.)

§ 6. Penalty.

Any person or persons, firm, company or corporation violating any of the provisions of this act shall be fined in any sum not less than one thousand dollars or more than ten thousand dollars, and may be enjoined from conveying and transporting natural gas through pipes otherwise than in this act provided: *Provided,* That nothing in this section shall operate to prevent the use of nitro-glycerine or other explosives for shooting any well or wells from which the gas is procured. (9061.)

[Acts 1893, p. 300. In force May 18, 1893.]

§ 7. To be confined in pipes.

1. That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles. Any person, firm or corporation violating any of the provisions of this section shall be fined in any sum not less than fifty dollars, nor more than two hundred dollars, and for any second or subsequent violation of this section he shall be fined in any sum not less than two hundred dollars, nor more than five hundred dollars. (As amended. Acts 1913, p. 66.)

§ 8. Civil liability.

Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this act, any person or corporation lawfully in possession of lands adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situate and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section 1 of this act and pack

and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in this State against the owner, lessee, agent or manager of said well, and each of them jointly and severally to recover the cost and expense of such tubing and packing, together with attorney's fees and costs of suit. This shall be in addition to the penalties provided by section 3 of this act. (9063.)

§ 9. Recovery of expense of plugging.

Whenever any person or corporation shall abandon or cease to operate any natural gas or oil well, and shall fail to comply with the provisions of section 2 of this act, any person or corporation lawfully in possession of lands adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situated and take possession of such well, and plug and fill the same in the manner provided by section 2 of this act, and may maintain a civil action in any court of competent jurisdiction of this State against the person, persons or corporations so failing, jointly and severally, to recover the costs and expense of such plugging and filling, together with attorney's fees and costs of suit. This shall be in addition to the penalties provided by section 3 of this act. (9064.)

[Acts 1891, p. 382. In force June 3, 1891.]

§ 10. Altering gas connections.

It is hereby declared to be unlawful for any person, in any manner whatever, to change, extend or alter, or cause to be changed, extended or altered any service or other pipe or attachment of any kind connecting or through which natural or artificial gas is furnished from the gas mains or pipes of any person, company or corporation without first procuring from said person, company or corporation, written permission to make such change, extension or alteration. (2705.)

§ 11. Making gas connections without consent.

It is hereby declared to be unlawful for any person to make, or cause to be made, any connection or reconnection, with the

gas mains or service pipes of any person, company, or corporation, furnishing to consumers natural or artificial gas, or to turn on or off, or in any manner interfere with any valve or stop-cock, or other appliances belonging to such person, company or corporation, and connected with its service or other pipes, or to enlarge the orifice of mixers, or to use natural gas for heating purposes except through mixers, without first procuring from such person, company or corporation a written permit to turn on or off such stop-cock or valve, or to make such connections or reconnection, or to enlarge the orifice of mixers, or to use gas for heating without mixers, or to interfere with the valves, stop-cocks, or other appliances of such person, company or corporation, as the case may be. (2706.)

§ 12. Refusal to deliver gas mixers.

It is hereby declared to be unlawful for any person or persons to whom any mixer or mixers or other appliances may be or may have been loaned or rented by any person, company or corporation for the purpose of furnishing gas through the same, to retain possession, or to refuse to deliver such mixer or mixers, or other appliances to the person, company or corporation entitled to the possession of the same, after such person, company or corporation shall have been entitled to the possession of the same, or to sell, loan or in any manner dispose of the same to any person or persons, other than said person, company or corporation entitled to the possession of the same. (2707.)

§ 13. Setting fire to gas.

It is hereby declared to be unlawful for any person or persons to set on fire any gas escaping from wells, broken or leaking mains, pipes, valves, or other appliances, used by any person, company or corporation in conveying gas to consumers, or to interfere in any manner with the wells, pipes, mains, gate boxes, valves, stop-cocks or other appliances, machinery or property of any person, company or corporation engaged in furnishing gas to consumers, unless employed by or acting under the authority and direction of such person, company or corporation engaged in furnishing gas to consumers. (2708.)

§ 14. Penalty.

Any person violating any provision of this act shall, upon conviction, be fined in any sum not less than five dollars nor more than one hundred dollars for such offense. (2709.)

[Acts 1891, p. 55. In force June 3, 1891.]

§ 15. Natural gas—preventing waste.

The use of natural gas for illuminating purposes, in what are known as flambeau lights, is a wasteful and extravagant use thereof, and is dangerous to the public good, and it shall therefore be unlawful for any company, corporation or person, for hire, pay or otherwise, to use natural gas for illuminating purposes in what are known as flambeau lights in cities, towns, highways, or elsewhere: *Provided,* That nothing herein contained shall be construed as to prohibit any such company, corporation or person from the necessary use of such gas in what are known as "jumbo" burners enclosed in glass globes, or lamps or by the use of other burners of similar character so enclosed, as will consume no more gas than said "jumbo" burners. (2710.)

§ 16. Jumbo burners—when lighted.

All gas lights in said "jumbo" burners and glass globes, or lamps used in all streets and public highways shall be turned off not later than 8 o'clock in the morning of each day such lights or burner is used, and the same shall not be lighted between the hours of 8 o'clock a. m. and 5 o'clock p. m. (2711.)

§ 17. Penalty.

Any one violating any of the provisions of section one (1) of this act, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not exceeding twenty-five dollars, and for a second offense may be fined in any sum not exceeding two hundred dollars. (2712.)

[Acts 1901, p. 97. In force March 6, 1901.]

§ 18. Meters open for inspection.

That every person, company or corporation now engaged or hereafter engaging in the business of furnishing natural or

artificial gas for heating, illuminating or other purposes, to be used and paid for by patrons by meter measure, shall furnish to each and every patron a meter properly tested and in good order, and shall arrange such meters so that the patron can, at any time, see the meter dial and ascertain how much gas he is consuming, and how much he is liable to pay for. (2713.)

§ 19. Excessive charges prohibited.

It shall be unlawful for any person, company or corporation engaged in furnishing gas to consumers, to be paid for by meter measure, to charge or receive, from any patron or consumer, pay for more gas than the meter furnished by such person, company or corporation shall indicate has been used by such consumer at the time to which payment is made and received. (2714.)

§ 20. Penalty for violation.

Any person, company or corporation violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than ten dollars and not more than one hundred dollars for each offense. (2715.)

[Acts 1905, p. 584. In force April 15, 1905.]

§ 21. False gas meter.

Whoever knowingly constructs, or uses or furnishes to gas consumers to be used, any false meter provided for measuring and registering the quantity of gas consumed by any person under a contract with any gas company, shall, on conviction, be fined not less than ten dollars nor more than one hundred dollars. (2608.)

[Acts 1901, p. 289. In force March 9, 1901.]

§ 22. Organization of oil company.

That such association [voluntary association] may be formed for one only of the following purposes: (4287.)

§ 23. Oil and gas wells.

To organize companies for the purpose of sinking and operating oil and gas wells, and of selling the products of such wells. (4304.)

[Acts 1889, p. 38. In force February 23, 1889.]

§ 24. "Mining" includes gas wells.

That it was and is the intent and meaning of said word "mining," as used in said chapter (chap. 35, R. S. 1881), to cover and include the sinking, drilling, boring and operating wells for petroleum and natural gas. (5134.)

§ 25. Capital stock limited.

That the capital stock of any company, corporation or association to carry on exclusively the business of mining, drilling, sinking and operating wells for petroleum and natural gas, or selling the same, or manufacturing petroleum and other minerals into gas for fuel and light, which company, corporation or association is or shall hereafter be incorporated under said chapter thirty-five (35) of the Revised Statutes of Indiana, shall not exceed two millions of dollars: *Provided*, That no suits now pending or the rights of the parties litigant thereto, shall be affected by the provisions of this act. (5137. As amended, Acts 1903, p. 227.)

[Acts 1889, p. 22. In force February 20, 1889.]

§ 26. Drilling for gas or oil.—Powers.

That whenever any company, corporation or voluntary association incorporated under the laws of the State of Indiana, or which may hereafter be incorporated thereunder for the purpose of drilling and mining for petroleum or natural gas, or otherwise acquiring gas or petroleum wells and the products thereof, and to furnish the same to its patrons for use within this state, and by manufacture to convert the same into gas for fuel and illuminating purposes, and other articles of commerce, shall desire to dig trenches and lay pipes for the purpose of conducting gas to its patrons within this State or conducting gas from its wells, or wells leased by it, or from

its manufactory to any point within this State, such company, corporation or voluntary associations shall possess the powers, be subject to the liabilities and restrictions expressed in the following:

First. To cause such examination and surveys as may be necessary to the selection of the most advantageous routes for the said trenches and pipes, and for such purposes, by their officers, agents and servants, to enter upon the lands and waters of any person; but subject to the responsibility for any damages which they shall do thereto.

Second. To receive, hold and take such voluntary grants and donation of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of such trenches and pipes, but the real estate thus received by voluntary grants shall be held and used for the purposes of such grants only.

Third. To purchase, and by voluntary grants and donations, receive and take, and by its officers, engineers, surveyors and agents enter and acquire an easement in and upon and take possession of and use all such lands and real estate and other property as may be necessary for the construction and maintenance of the said trenches and pipes, and other accommodations necessary to accomplish the objects for which the company, corporation or voluntary association is created; but not until the compensation to be made therefor is agreed upon by the parties, or ascertained as hereinafter prescribed shall have been paid to the owner or owners thereof or deposited as hereinafter directed, unless the consent of such owner be given to enter into possession.

Fourth. To locate and lay out and construct its said trenches, not exceeding one rod in width for a single pipe line, and to construct the same; said trenches and pipe lines in all cases to be laid at such depth as not to interfere with the tillage of the soil, or the existing drainage, and the soil taken from said trenches shall be returned with the top soil on top, as originally found; said company, corporation or voluntary association to have the right to enter and go upon said right of way by its officers and agents, without hindrance, for the purpose of digging said trenches and laying said pipe, inspecting, operating and repairing the same.

Fifth. To dig its trenches, to lay its pipe lines over, across or under any stream of water, water-course, road, highway or railroad, so as not to interfere with the free use of the same, which the route thereof shall intersect, in such manner as to afford security for life or property. And whenever the board of county commissioners of the proper county shall so direct, said trenches and pipe lines may be constructed and laid along the right of way of any road or highway, but in all cases where said trenches or pipe lines shall be laid across, upon or along any gravel road, road or highway thus intersected, said company, corporation or voluntary association shall immediately, upon the laying of any such pipe, restore the same to its former state, or in a sufficient manner not to have unnecessarily impaired its usefulness or injured its franchises.

Sixth. To purchase or acquire easements in and upon lands, and it may change the line of its said trenches and pipe lines whenever a majority of the directors shall so determine. (5138.)

§ 27. Right of way.

Whenever any such company, corporation or voluntary association is unable to agree with the owner or owners about the purchase of any real estate in any county required for the construction of its trenches and the laying of the mains and connecting pipes, it shall have the right to acquire an easement in and upon the same in the manner and by the special proceedings prescribed in this act. (5139.)

§ 28. Easement appropriated.—Damages.—Procedure.

Such company, corporation or voluntary association is hereby authorized to enter upon any land for the purpose of examining and surveying its line for trenches and pipe lines, and may acquire an easement in and upon so much thereof as may be deemed necessary for its said trenches, not exceeding one rod in width for any single pipe line. The company, corporation or voluntary association shall forthwith deposit with the clerk of the circuit or other court of record in the county where the line lies, a description of the rights and interest intended to be appropriated, and an easement in such land, rights and interest shall belong to such company, corporation or volun-

tary association to use for the purpose specified, by making or tendering payment as hereinafter provided. The company, corporation or voluntary association may, by its directors, purchase any such lands, right of way or interest of the owner of such land, or in case the same is owned by a person insane or an infant, at a price to be agreed upon by the regularly constituted guardian of said insane person or infant, if the same shall be approved by the court in which the description aforesaid shall be filed, and on such agreement and approval the owner or guardian, as the case may be, shall convey the easement or right of way upon the said premises so purchased, to such company, corporation or voluntary association, and the deed when made shall be valid in law. If the company, corporation or voluntary association shall not agree with the owner of the land "or with his guardian if the owner is incapable of contracting" touching the damages sustained by such owner, such company, corporation or voluntary association shall deliver to such owner or guardian within the county a copy of such instrument of appropriation. If the owner "or his guardian, in case such owner is incapable of contracting," be unknown or does not reside within the county, such company, corporation or voluntary association shall publish in some newspaper of general circulation in the county, for the term of three weeks, an advertisement reciting the substance of such instrument of appropriation. Upon filing such act of appropriation and the delivery of such copy or making of such publication, the circuit court or other court of record in the county where the land lies, or any judge thereof in vacation, upon the application of either party, shall appoint by warrant three disinterested freeholders of said county to appraise the damages which the owner of the land may sustain by such appropriation. Such appraisers shall be duly sworn. They shall consider the injury which such owner may sustain by reason of such trenches and pipe lines, and shall forthwith return their assessment of damages to the clerk of such court, setting forth the value of the property taken or injury done to the property "which they shall assess to the owner or owners separately," to be by him filed and recorded. Thereupon said company, corporation or voluntary association shall pay to such clerk the amount thus assessed, or tender the same to the party in whose favor the damages are awarded or assessed.

On making payment or tender thereof in the manner herein required, it shall be lawful for such company, corporation or voluntary association to hold the interest in said lands or material so appropriated for the uses aforesaid: *Provided, First,* That any person aggrieved by the action or assessment of any appraisers appointed under this act may appeal therefrom to the circuit court of their county, under the same provisions and subject to the same restrictions as provided for in case of appeals from assessments under the laws of this State for the appropriation of real estate for rights of way of railroads, as provided by an act of the general assembly of the State of Indiana, in force May 6, 1853, and all acts amendatory thereof: And *Provided, further,* That nothing in this act contained shall in any manner abridge or impair the rights of incorporated towns and cities by their respective councils, boards of aldermen or boards of trustees to grant to such corporations or companies the privilege to use and occupy the streets and alleys of such cities and towns for the purpose of laying mains for conveying gas to their patrons. (5140.)

§ 29. Conflicting claimants.—Money paid into court.

If there are diverse or conflicting claimants to the money or any part of it to be paid as compensation for the real estate taken, the court may direct the money to be paid into said court by said company, corporation or voluntary association until it can determine who is entitled to the same, and shall direct to whom the same shall be paid, and may, in its discretion order a reference to ascertain the facts on which said determination and order are to be made. (5141.)

§ 30. Attorneys for unkown parties.—Powers of court.

The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown and who has not appeared in the proceedings by an attorney or agent. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this act as may be necessary, or to cause new parties to be added, and to direct such further notice to be given to any party in interest as it deems proper, and also to appoint other commissioners in the place of any

who shall die or refuse or neglect or be unable to serve, or who may leave or be absent from the State. (5142.)

§ 31. New proceedings.—Limit of right to condemn.

At any time after an attempt to acquire title by appraisement of damages or otherwise, if it shall be found that the title thereby attempted to be acquired is defective, the company, corporation or voluntary association may proceed anew to acquire or perfect the same in the same manner as if no appraisal had been made: *Provided,* That the provisions of this act shall not be construed to give to any person, corporation or association the right to enter upon lands and dig or prospect for natural gas or oil, or to take any lands for the purpose of digging or boring any wells, but it shall be construed to give the right to take the right of way for pipe lines only: And *Provided, further,* That no person or corporation shall have the right to condemn or take any lands, or lay their pipe lines within seventy-five yards of any dwelling or barn, unless the owner shall agree in writing that the same may be placed within such distance, except when the line of such pipes shall be along a public highway. (5143.)

[Acts 1907, p. 340. April 10, 1907.]

§ 32. Gas companies, eminent domain.

That whenever any corporation or voluntary association, organized under the laws of the State of Indiana, or which may hereafter be incorporated thereunder for the purpose of manufacturing, piping, distributing or selling artificial or other gas for heat, light, fuel, or power or whenever any person or corporation engaged in the business of manufacturing, piping, distributing or selling artificial or other gas for heat, light, fuel, or power, and furnishing the same to its patrons within this State, shall desire to dig trenches and lay, maintain or repair pipes or mains outside of the limits of corporate cities or towns for the purpose of conducting and distributing gas or its products to its patrons within this State, or from its manufactory to its patrons at any point within this State, such person, corporation or voluntary association shall have the rights and powers conferred upon and granted to, and be sub-

ject to the liabilities and restrictions imposed upon corporations organized for the purpose of drilling and mining for petroleum or natural gas and marketing the same by an act entitled "An act to authorize companies organized for the purpose of drilling and mining for petroleum or natural gas and marketing the same to appropriate and condemn real estate and declaring an emergency," approved February 20, 1889. (5144.)

§ 33. Board of trustees.—Power to hold and vote stock.

That the subscribers to the capital stock of any company, corporation or voluntary association, organized for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any village, town or city within the State of Indiana, may, by written stipulation at the time of making subscriptions to the capital of said company, corporation or voluntary association, and with one another, that the power of holding and voting said capital stock may be irrevocably given to a board of trustees or a majority of them, which said board of trustees may be selected in such manner as the articles of incorporation may provide. (5145.)

§ 34. Existing agreements validated.

That any such agreement heretofore made by the subscribers to the capital of any company, corporation or voluntary association organized for the purposes set forth in the preceding section, shall be valid and binding upon said subscribers to the capital stock and their assigns. (5146.)

[1 R. S. 1852, p. 358. In force May 6, 1853.]

§ 35. Marine railways.—Gas pipes.

Corporations, building steamboats and other vessels shall have the right to construct marine railways, and all other necessary fixtures and machinery for repairing and launching the same; and gas light companies may lay pipes through the streets and alleys of any incorporated city or town, by repairing or making good any injury done thereto. (5072.)

[Acts 1883, p. 17. In force February 21, 1883.]

§ 36. Gas and water works companies.

That any gas light or water works company in any city or town of this State shall be authorized and empowered to extend their pipes and mains beyond the corporate limits of such city or town, not to exceed a distance of five miles from the corporate limits of any such city or town, for the purpose of supplying persons or corporations with gas or water, and any such company shall be authorized and empowered to furnish and supply gas or water to any persons or corporations residing or located within five miles of the corporate limits of any such city or town. (5073.)

[Acts 1891, p. 199. In force March 6, 1891.]

§ 37. Gas, water and hydraulic companies.

The personal property of gas and coke companies, natural gas companies, electric light companies, water works companies and hydraulic companies shall be listed and assessed in the township, town or city where the principal works are located: the mains, pipes and wires of such companies laid in or along roads, streets or alleys shall be listed as personal property in the township, city or town where the same are laid or placed. (10166.)

[Acts 1891, p. 199. In force March 6, 1891.]

§ 38. Statement under oath.

Every street railroad, water works, gas, manufacturing, mining, gravel road, plank road, saving(s) bank, insurance and other associations incorporated under the laws of this State (other than railroad companies and those heretofore specifically designated) shall, by its president or other proper accounting officer, between the first day of March and the fifteenth day of May of the current year, in addition to the other property required by this act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

First. The name and location of the company or association.

Second. The amount of capital stock authorized, and the number of shares in which such capital stock is divided.

Third. The amount of capital stock paid up.

Fourth. The market value, or if no market value, then the actual value of the shares of stock.

Fifth. The total amount of indebtedness, except the indebtedness for current expenses, excluding from such expenses the amount paid for the purchase or improvement of property.

Sixth. The value of all tangible property.

Seventh. The difference in value between all tangible property and the capital stock.

Eighth. The name and value of each franchise or privilege owned or enjoyed by such corporation.

Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of State. In case of the failure or refusal to make report, such corporations shall forfeit and pay one hundred dollars for each additional day such report is delayed beyond the fifteenth day of May, to be sued and recovered in any proper form of action in the name of the State of Indiana, on the relation of the prosecuting attorney, such penalty when collected, to be paid into the county treasury. And such prosecuting attorney in every case of conviction shall be allowed a docket fee of ten dollars to be taxed as costs in such action. (10233. As amended, Acts 1903, p. 49.)

§ 39. Schedule.

Such statement shall be scheduled by the assessor and such schedule, with the statement so scheduled, shall be returned by the assessor to the county auditor. The auditor shall annually, on the meeting of the county board of review, lay before said board the schedule and statements herein required to be returned to him, and said board shall value and assess the capital stock and all franchises and privileges of such companies or associations in the manner provided in this act, and the said auditor shall compute and extend the taxes for all purposes on the respective amounts so assessed, the same as may be levied on other property in such towns, cities or other localities in which such companies or associations are located. In all cases where the capital stock of any such

corporation exceeds in value that of the tangible property listed for taxation, then such capital stock shall be subject to taxation upon such excess of value; where no tangible property is returned or found, and the capital stock has a value; it shall be assessed for its true cash value. But where the capital stock, or any part thereof, is invested in tangible property, returned for taxation, such capital stock shall not be assessed to the extent that is so invested. Every franchise or privilege of any such corporation shall likewise be assessed at its true cash value. Where the full value of any franchise is represented by the capital stock listed for taxation then such franchise shall not itself be taxed; but in all cases where the franchise is of greater value than the capital stock, then the franchise shall be assessed at its full cash value, and the capital stock in such case shall not be assessed. (10234.)

§ 40. Failure.—Duty of auditor of State.

In case of the failure or refusal of the person or persons, joint stock associations, companies or corporations, their officers, agents or employes specified in the preceding section to make and return the statements and reports therein provided for, the auditor of State shall make out such returns, statements and valuations from the best information he can obtain, and for that purpose he shall have power to summon and examine, under oath, any person whom he may believe to have a knowledge thereof. And he shall add to such valuation twenty-five per centum thereon. (10235.)

[Approved March 5, 1909. Acts 1909, p. 234.]

§ 41. Natural gas supervisor.—Plugging wells.

Sec. 1. *Be it enacted by the General Assembly of the State of Indiana:* That before the casing shall be drawn from any well drilled into gas or oil-bearing rock for the purpose of abandoning the same, it shall be the duty of any person, firm or corporation having the custody of such well, or having charge of removing the casing therefrom for the purpose of abandoning the same, at the time of such abandonment, to properly and securely stop and plug each of said wells so abandoned in the following manner: Such hole shall first be

solidly filled from the bottom thereof to a point at least twenty-five (25) feet above such gas or oil-bearing rock with sand, gravel or pulverized rock, on the top of which filling shall be seated a dry pine wood plug not less than two (2) feet long and having a diameter of one-fourth of an inch less than the inside diameter of the casing in such well; above such wooden plug such well shall be solidly filled for at least twenty-five (25) feet with the above-mentioned filling material, immediately above this shall be seated another wooden plug of the same kind and size as above provided, and such well shall again be solidly filled for at least twenty-five (25) feet above said second plug with such filling material. After the casing has been drawn from such well there shall immediately be seated at the point in said well where such casing was seated a cast-iron ball, the diameter of which ball shall be greater than that of the hole below the point where such casing was seated, and above such ball such well shall again be solidly filled with the above-mentioned filling material for a distance of fifty (50) feet. Any person, firm or corporation owning or having charge or supervision of any well which has been drilled into gas or oil-bearing rock, or having charge or control of removing the drive pipe or casing from any such well, and from which the drive pipe and casing or the drive pipe alone has been or shall be pulled, leaving therein the tubing, casing, or both, shall give notice to the State natural gas supervision (supervisor), and under the supervision and direction of said supervisor, or one of his assistants, shall plug such tubing, where such tubing only remains in such well, and shall fill from the bottom up not less than three hundred (300) feet with cement and clean sand, one part Portland cement to four parts of sand, and where the casing and tubing remains in any such well, such well shall be filled on the packer with not less than fifty (50) feet of Portland cement and sand, and if there be no such packer, with not less than one hundred (100) feet of Portland cement and sand in the proportion hereinbefore indicated, and in all cases where the drive pipe and casing or either the drive pipe or casing are removed from any such well and the tubing is left therein said tubing shall be plugged as herein provided, and if any part of the tubing, drilling-stem or other substance prevent the plugging of any such well or wells as hereinbefore provided, such well or wells

shall be filled to a point within twenty-five (25) feet of the top part of said tubing, drill-stem or substance with sand, gravel or crushed stone, and shall thereupon be filled to a point twenty-five (25) feet above such part of tubing, drill-stem or substance with Portland cement and sand, all proportioned as above provided.

§ 42. Notice to supervisor.—Fee.

Sec. 2. Any person, firm or corporation, before proceeding to plug any such well so drilled into any gas or oil-bearing rock, or to pull the casing or drive pipe therefrom, shall notify the State natural gas supervisor, or one of his authorized assistants, of such intention, and the time and place where such plugging is to be done, and it shall be the duty of said natural gas supervisor or his duly authorized assistants to be present in person all the time while such plugging is being done, and the same shall be done under his instructions and supervision, and such person, firm or corporation so plugging such well shall file, or cause to be filed, in the office of the recorder of the county in which any such well is located, within fifteen days after the same has been plugged, as provided in section one (1) hereof, a written statement of such State natural gas supervisor, or his duly appointed assistant, showing that such well was duly plugged under his personal supervision and instruction and in the manner herein prescribed and required, which statement shall be recorded in the miscellaneous records in the office of such recorder. And for supervising and superintending the plugging of any such well, said person, firm or corporation plugging such well or having the same done, shall pay in advance of doing any such work or plugging a fee of five dollars ($5.00) to the State natural gas inspector or his assistants, to be by them turned into the State treasury.

§ 43. Assistants.—Compensation.

Sec. 3. For the purpose of enforcing the provisions of this act and supervising the plugging of said wells the State natural gas inspector shall appoint such assistants as he may deem necessary, who shall receive for their services for such supervision in the plugging of each well the sum of five dollars ($5.00), to be paid by the treasurer of State each month,

upon a warrant drawn by the auditor of State, upon a verified statement made by said assistants showing the wells plugged by him during such month, their location, the date when plugged and by whom the fee has been paid, and file the same with the auditor of State. Such verified statement shall, before any warrant is drawn thereon or therefor, be approved by the State natural gas supervisor, and in no event shall any such assistant be paid any such fee until the same shall have been (paid) into the treasury of State as herein provided.

§ 44. Salt water or oil.

Sec. 4. It shall be the duty of every person, firm or corporation who sinks or maintains a well to the depth of the oil or salt-bearing strata to prevent the salt water or oil of any such well from flowing into fresh water strata of that or any other wel[1]

§ 45. Fresh water.—Casing off.

Sec. 5. It shall be the duty of any person, firm or corporation sinking a well into any gas or oil-bearing rock, or maintaining the same after it has been sunk, to case off and keep cased off all fresh water from such well until such well has been plugged as herein provided.

§ 46. Powers of supervisor.

Sec. 6. For the purpose of enforcing the provisions of this act that State natural gas supervisor is hereby authorized and empowered to enter upon any land at any time for the purpose of examining or testing any such well or wells for the purpose of plugging the same, and said supervisor and his assistants are hereby given police powers to arrest persons found violating any of the provisions of this act.

§ 47. Penalty.

Sec. 7. Any person, firm or corporation violating any of the provisions of this act shall, on conviction, be fined in any sum not less than one hundred dollars nor more than one thousand dollars, to which may be added imprisonment in the county jail not to exceed six months.

§ 48. Repealing section.

Sec. 8. All laws and parts of laws in conflict herewith are hereby repealed.

§ 49. Emergency.

Sec. 9. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force from and after its passage.

KANSAS.

§ 1. Drilling well near railway.
§ 2. Misdemeanor.
§ 3. Transporting gas.
§ 4. Increasing flow of gas.
§ 5. Penalty, violating two preceding sections.
§ 6. Casing wells.
§ 7. Filling well.
§ 8. Misdemeanor.
§ 9. Release of forfeited lease.
§10. Action to compel release.
§11. Demand for release.
§12. Repealing section.
§13. Lien for labor and material.
§14. Subcontractor or materialman.
§15. Enforcement of liens.
§16. Repealing section.

AN ACT prohibiting the drilling and operating of oil and gas wells within certain limits from the rights of way of steam and electric railway lines, and fixing penalties for the violation thereof.

[General Statutes, 1909.]

§ 1. Near railway.

Par. 10. It shall be unlawful for any person, firm, company or corporation in this State to drill or operate gas or oil wells within one hundred feet of the center of the right of way of any steam or electric line of railway. (L. 1905, chap. 210, par. 1, June 8, § 3915.)

§ 2. Misdemeanor.

Par. 11. Any person, firm, company or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any

sum not less than one hundred nor more than one thousand dollars. (Id., par. 2, § 3914.)

AN ACT to regulate the mode of procuring, transporting and using natural gas, and to provide penalties for its violation.

§ 3. Transporting gas.

Par. 12. That any person or persons, firm, company or corporation engaged in drilling for, piping, transporting, using or selling natural gas may transport or conduct the same through sound wrought or cast-iron or steel casings and pipes tested to at least four hundred pounds pressure to the square inch. (L. 1905, chap. 312, par. 1; March 8; § 3915.)

§ 4. Increase flow.

Par. 13. It is hereby declared to be unlawful for any person or persons, firm, company or corporation to use any devise for pumping, or any other artificial process or appliance that shall have the effect of increasing the natural flow of natural gas out of any well. (Id., par. 3; § 3916.)

§ 5. Penalty violating two preceding sections.

Par. 14. Any person or persons, firm, company or corporation violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than one hundred dollars or more than ten thousand dollars, and may be enjoined from conveying and transporting natural gas through pipes otherwise than in this Act provided: *Provided*, That nothing in this section shall operate to prevent the use of nitroglycerine or other explosives for shooting any well or wells from which the gas is procured. (Id., par. 3; § 3917.)

AN ACT regulating the casing of oil and gas wells, and the mode of plugging the same when abandoned.

§ 6. Casing wells.

Sec. 26. That the owner or operator of any well put down for the purpose of exploring for and producing oil or gas shall, before drilling into the oil or gas-bearing rock, encase the well with good and sufficient wrought iron, oil-well casing, and in such manner as to exclude all surface or fresh water from the

lower part of such well, and from penetrating the oil or gas-bearing rock. Should any well be put down through the first into a lower oil or gas-bearing rock, the same shall be cased in such manner as will exclude all fresh or salt water from both upper and lower oil or gas-bearing rocks penetrated. (L. 1891, chap. 151, § 1; March 20; § 3918.)

§ 7. Filling well.

Sec. 27. The owner of any well, when about to abandon or cease operating the same, for the purpose of excluding all fresh or salt water from penetrating the oil or gas-bearing rock or rocks, and before drawing the casing, shall fill the well with sand or rock sediment to the depth of two feet below the top of each oil or gas-bearing rock, and drive therein a round, seasoned wooden plug at least two feet in length, and in diameter equal to the full diameter of the well below the casing, and immediately upon drawing the casing, shall fill in on top of such plug with sand or rock sediment to the depth of five feet, and again drive into the well a round wooden plug three feet in length, the lower end tapering to a point, and to be of the same diameter at the distance of eighteen inches from the smaller end as the diameter of the well below the point at which it is driven; and after such plug has been driven, the well shall be filled with sand or rock sediment to the depth of twenty feet. (Id., § 2; § 3918.)

§ 8. Misdemeanor.

Sec. 28. Any owner or operator or person, who shall violate the provisions of the preceding sections of this Act, shall be guilty of a misdemeanor, and shall be fined in the sum of five hundred dollars for each and every offense, which fine when collected shall be paid to the school fund of the county in which the well is situated. (Id., § 3; § 4316.)

AN ACT in relation to the release or record of oil, gas and other mineral leases, providing civil remedies in connection therewith, and repealing Chapter 314 of the Session Laws of 1905.

§ 9. Release of forfeited lease.

Sec. 1. When any oil, gas or other mineral lease heretofore or hereafter given on land situated in any county of Kansas and re-

corded therein shall become forfeited it shall be the duty of the lessee, his successors or assigns within sixty days from the date of the taking effect of this act, if the forfeiture occurred prior thereto and within sixty days after the date of the forfeiture of any other lease, to have such surrendered in writing, such surrender to be signed by the party making the same, acknowledged and placed on record in the county where the leased land is situated without cost to the owner thereof; provided that if the said lessee, his successors or assigns shall fail or neglect to execute and record such surrender within the time provided for, then the owner of said land may serve upon said lessee, his successors or assigns, in person or by registered letter, at his known address, or by publication for three consecutive weeks in a newspaper of general circulation in the county where the land is situated, a notice in writing in substantially the following form:

To I, the undersigned owner of the following described land situated in county, Kansas, to wit: (Description of land) upon which a lease, dated day of, 19...., was given to, do hereby notify you that the terms of said lease have been broken by the owner thereof, that I hereby elect to declare and do declare the said lease forfeited and void and that, unless you do, within twenty days from this date, notify the register of deeds of said county as provided by laws, that said lease has not forfeited, I will file with the said register of deeds affidavit of forfeiture as provided by laws; and I hereby demand that you execute or have executed a proper surrender of said lease and that you put the same of record in the office of the register of deeds of said county within twenty days from this date.

Dated this day of, 19.....

.....

And the owner of said land may after twenty days from the date of service, registration or first publication of said notice, file with the register of deeds of the county where said land is situated an affidavit setting forth that the affiant is the owner of said land, that the lessee, or his successors or assigns, has failed

and neglected to comply with the terms of said lease, reciting the facts constituting such failure; that the same has been forfeited and is void; and setting out in said affidavit a copy of the notice served, as above provided and the manner and time of the service thereof. If the lessee, his successors or assigns, shall within thirty days after the filing of such affidavit, give notice in writing to the register of deeds of the county where said land is located that said lease has not been forfeited and that said lessee, his successors or assigns still claims that said lease is in full force and effect, then the said affidavit shall be recorded, but the register of deeds shall notify the owner of the land of the action of the lessee, his successors or assigns, and the owner of the land shall be entitled to the remedies now provided by law for the cancellation of such disputed lease. If the lessee, his successors or assigns shall not notify the register of deeds as above provided, then the register of deeds shall record said affidavit and thereafter the record of the said lease shall not be notice to the public of the existence of the said lease or of any interest therein or rights thereunder and said record shall not be received in evidence in any court of the state on behalf of the lessee, his successors or assigns, against the lessor, his successors or assigns.

Sec. 2. That when an oil, gas or mineral lease is hereafter given on land situated within the State of Kansas, the recording thereof in the office of the register of deeds of the county in which the land is located shall impart notice to the public of the validity and continuance of said lease for the definite term therein expressed, but no longer; provided, that if such lease contains the statements of any contingency upon the happening of which the term of any such lease may be extended (such as "and as much longer as oil and gas or either are produced in paying quantities"), the owner of said lease may at any time before the expiration of the definite term of said lease file with said register deeds an affidavit setting forth the description of the lease, that the affiant is the owner thereof and the facts

showing that the required contingency has happened. This affidavit shall be recorded in full by the register of deeds, and such records, together with that of the lease, shall be due notice to the public of the existence and continuing validity of said lease until the same shall be forfeited, canceled, set aside or surrendered according to law. (As amended March 19, 1915. Acts 1915, p. 284.)

§ 10. Action to compel release.

Par. 19. Should the owner of such lease neglect or refuse to execute a release as provided by this Act, then the owner of the leased premises may sue in any court of competent jurisdiction to obtain such release, and he may also recover in such action of the lessee, his successors or assigns, the sum of one hundred dollars as damages, and all costs, together with a reasonable attorney's fee for preparing and prosecuting the suit, and he may also recover any additional damages that the evidence in the case will warrant. In all such actions, writs or attachment may issue as in other cases. (Id., par. 2; § 3922.)

§ 11. Demand for release.

Par. 20. At least twenty days before bringing the action provided for in this Act, the owner of the leased land, either by himself or by his agent or attorney, shall demand of the holder of the lease (if such demand by ordinary diligence can be made in this State), that said lease be released of record. Such demand may be either written or oral. When written, a letter-press or carbon copy thereof, when shown to be such, may be used as evidence in any court with the same force and effect as the original. (Id., par. 3.)

§ 12. Repealing section.

Section 4, chapter 314 of the Session Laws of 1905 is hereby repealed.

AN ACT relating to liens for labor and materials furnished to owners of leaseholds for oil and gas purposes and for materials and labor for the construction of oil and gas pipe lines.

§ 13. Lien for labor and material.

Par. 21. Any person, corporation or copartnership who shall under contract, express or implied, with the owner of any

leasehold for oil and gas purposes, or the owner of any gas pipe line or oil pipe line, or with the trustee or agent of such owner, who shall perform labor or furnish material, machinery and oil-well supplies used in the digging, drilling, torpedoing, completing, operating or repairing of any oil or gas well, or who shall furnish any oil-well supplies or perform any labor in constructing or putting together any of the machinery used in drilling, torpedoing, operating, completing or repairing of any gas well, shall have a lien upon the whole of such leasehold or oil pipe line or gas pipe line, or lease for oil and gas purposes, the building and appurtenances, and upon the material and supplies so furnished, and upon said oil and gas well for which they were furnished, and upon all the other oil wells, fixtures and appliances used in the operating for oil and gas purposes upon the leasehold for which said material and supplies were furnished and labor performed. Such lien shall be preferred to all other liens or incumbrances which may attach to or upon said leasehold for gas and oil purposes and upon any oil pipe line or gas pipe line, or such oil and gas wells, and the material and machinery so furnished and the leasehold for oil and gas purposes and the fixtures and appliances thereon subsequent to the commencement of or the furnishing or putting up of any such machinery or supplies. (L. 1909, chap. 159, par. 1; March 31; § 3924.)

§ 14. Sub-contractor or material-man.

Par. 22. Any person, copartnership or corporation who shall furnish such machinery or supplies to a sub-contractor under a contractor, or any person who shall perform such labor under a sub-contract with a contractor, or who as an artisan or day laborer in the employ of such contractor, and who shall perform any such labor, may obtain a lien upon said leasehold for oil and gas purposes or any gas pipe line or any oil pipe line from the same tank and in the same manner and to the same extent as the original contractor for the amount due him for such labor, as provided in section 1 of this Act. (Id., Par. 2; § 3925.)

§ 15. Enforcement of lien.

Par. 23. The liens herein created shall be enforced in the same manner, and notice of the same shall be given in the same

manner, and the material-man's statement or the lien of any laborer herein mentioned shall be filed in the same manner as provided for in sections 2 and 3 of chapter 168, Session Laws of Kansas for the year 1899, and all actions brought for the purpose of enforcing such liens shall be governed by article 27, chapter 80, of procedure civil, as provided in the General Laws of Kansas for the year 1901. (Id., par. 3; § 3926.)

§ 16. Repealing section.

Sec. 4. All Acts and parts of Acts in conflict with this Act are hereby repealed. (Id., par. 4.)

COUNTY GAS INSPECTOR.

§ 1. County board may appoint gas inspector.
§ 2. Oath and bond of gas inspector.
§ 3. Reports to be made to inspector.
§ 4. General duties of inspector.
§ 5. Other duties of inspector.
§ 6. Duties of inspector concerning leaks.
§ 7. Duty of owner to allow inspection.
§ 8. Appointment of deputy inspector.—Duty and bond of deputy.
§ 9. Penalty for violating act.
§ 10. Compensation of inspector.
§ 11. Appointment of county inspector.
§ 12. Duties concerning plugging of wells.
§ 13. Log of well to be furnished.
§ 14. Penalty for violating act.
§ 15. Pay of oil inspector.
§ 16. Repealing section.
§ 17. Emergency.

AN ACT authorizing the appointment of an inspector of natural gas, gas wells and natural gas pipe lines by the county commissioners of the various counties in this State, and prescribing the powers, duties and compensation of such inspector representing and regulating such gas, well, and lines, and providing for reports to be made to him by owners of gas wells and premises upon which such wells are located, and providing penalties for the violation of this Act.

[General Statutes, 1909.]

§ 1. Gas inspector.

Par. 24. In each county in this State the board of county commissioners is hereby authorized, in its discretion, to appoint a suitable and competent person, who shall not be interested privately in producing, piping or selling natural gas, to be known and designated as the "gas inspector" of such county,

who shall serve for a term of two years from the date of his appointment and qualification and until his successor shall be appointed and qualified: *Provided,* That said board may end said term by an order to that effect at any time after the expiration of said period of two years without appointing such successor. (L. 1905, chap. 313, par. 1; March 24; § 3927.)

§ 2. Oath and bond.

Par. 25. He shall be required, before assuming the duties of his office, to take and subscribe an oath or affirmation that he will faithfully, impartially and to the best of his skill and ability discharge his duties, which oath or affirmation shall be filed with the county clerk of the county for which he is appointed, and within ten days after his appointment he shall file with said county clerk a good and sufficient bond to the people of the State of Kansas, with a resident surety or sureties to be approved by said county commissioners, in the sum of three thousand dollars, conditioned for the faithful performance of his duties. (Id., par. 2; § 3928.)

§ 3. Report wells.

Par. 26. All persons are hereby required to report in writing, by mail or otherwise, to said inspectors, within thirty days after their appointment and qualification, the location and number of all wells in the county of such inspector belonging in whole or part to them or which are upon premises owned in whole or part by them, except only such wells as have already been reported to some predecessor of said inspector, and they shall also report to him in writing the number and location of each of such gas wells thereafter drilled within two days after its completion. (Id., par. 3; § 3929.)

§ 4. Inspector's duty.

Par. 27. It shall be the duty of such inspector to see that all provisions of law pertaining to the drilling for gas, the regulating of gas wells and the piping and consumption of natural gas are faithfully carried out, and that the penalties of such laws are enforced against all violators of the same; and to that end he shall promptly report all violations of such laws that come to his knowledge to the county attorney of his county, and file a proper complaint for the prosecution of the offender. (Id., par. 4; § 3930.)

§ 5. The same; record.

Par. 28. Said inspector shall inspect all gas wells in his county. He shall measure and record, as nearly as can be ascertained, the initial rock-pressure of, and also the volume of gas produced by, each of such wells. Such inspection shall be made and measurements taken and recorded at least once in each six-months' period during his term of office, and at any other time or times directed by the board of county commissioners. All such records shall be entered and kept in substantially bound record books, suitably ruled, printed, indexed and arranged for that purpose, to be provided by the county and kept in the office of the register of deeds subject to public inspection. (Id., par. 5; § 3931.)

§ 6. Duties concerning pipe lines.

Par. 29. Such inspector shall also inspect all natural gas pipe lines in his county at least once in every period of six months during his term of office, and as much oftener as may be necessary or as may be directed by the board of county commissioners, and shall test and record the pressure of the gas therein and the volume of the flow through the same, as nearly as is practicable. If he shall discover any leakage or waste of gas from any such well or pipe line, he shall notify the owner thereof, or his agents or servants, or some one of them, of that fact, and if such leakage or waste be not stopped within two days after such notice, it shall be and it is hereby made the duty of such inspector to take such steps and make such changes and repairs as may in his judgment be necessary to stop said waste or leakage; and he shall have a lien upon said well or pipe line and all wells with which the same may be connected for the material, labor and cost of making such repair, for the enforcement of which, with all costs of suit, and a reasonable attorney's fee, an action may be maintained by said inspector in any court of competent jurisdiction; and if gas shall be taken from any well at a rate such as to consume more than fifty per cent. of its daily production, it shall be deemed a waste within the meaning of this clause to the extent of such excess. If any owner of any such well or pipe line, or any agent or servant of such owner in charge and control of such well or pipe line, shall for more than two

days after the service of the notice last aforesaid fail to stop the leakage or waste by this clause prohibited, such owner, agent or servant shall be guilty of a misdemeanor, and on conviction thereof shall be fined a sum of not less than twenty-five dollars nor more than five hundred dollars for each offense, and each day that such failure continues after the expiration of the said period of two days, shall constitute a separate offense. (Id., par. 6; § 3932.)

§ 7. Interference.

Par. 30. No person or persons in this State owning or having control of natural gas pipe lines shall refuse to allow the same to be inspected by the natural gas inspector, nor shall any such person interfere with said inspector, directly or indirectly in the performance of his duties as herein prescribed, and it is made the duty of all such persons to furnish said inspector reasonable facilities and opportunity to make any inspection or perform any duty hereby authorized. (Id., par. 7; § 3933.)

§ 8. Deputies; qualification.

Par. 31. The inspector provided for in this Act is hereby authorized, with the consent and approval of the board of county commissioners, to appoint and assign for duty deputies, not exceeding two in number, at such time and for such terms as in his judgment may be necessary to enable him promptly to perform all the duties of his office. Such deputies shall have the same qualifications as the inspector. Said inspector shall be liable for all acts or omissions of his deputies in the performance of their duties. Each deputy, before he enters upon the duties of his office, shall execute a bond to the inspector, with sureties to be approved by him, in the sum of one thousand dollars, which shall be filed with the inspector, and shall be conditioned for the faithful performance of the duties of such deputies. The said inspector shall provide himself and deputies with proper instruments and appliances for use in the performance of his and their duties in making the tests and records herein designated. (Id., par. 8; § 3934.)

§ 9. Penalty.

Par. 32. Any person violating any of the foregoing provisions of this Act, except those for the violation of which penalties are especially prescribed, shall be guilty of a misdemeanor, and on conviction thereof shall be fined in the sum of not less than twenty-five dollars nor more than five hundred dollars. (Id., par. 9; § 3935.)

§ 10. Compensation.

Par. 33. The compensation of such inspectors shall be five dollars per day for the time actually and necessarily consumed by them in the performance of their duties as herein prescribed, and the compensation of each deputy inspector shall be four dollars per day for each day actually and necessarily consumed by him in the performance of his duties as herein prescribed, and the same shall be paid by the county in which such service is performed, upon allowance by the board of county commissioners, as other claims against such county. (Id., par. 10; § 3936.)

RELATING TO THE PLUGGING OF OIL AND GAS WELLS.—APPOINTMENTS OF AN INSPECTOR.

[House Bill No. 145.]

AN ACT in relation to the plugging of abandoned oil and gas wells, providing for the appointments of an inspector, outlining duties of such inspector and providing penalties for the violation thereof.

[Acts 1913, p. 345.]

Be it enacted by the legislature of the State of Kansas:

§ 11. Appointment of county inspector.

Section 1. For the purpose of carrying out the provisions of section 3919 of the General Statutes of 1909. The board of county commissioners of each county in the State of Kansas in which oil or gas wells have been drilled or may hereafter be drilled may appoint some suitable person who has had at least two years' experience in drilling and operating oil or gas wells

and who is not directly interested in the production of gas or oil to personally direct and supervise the plugging of oil or gas wells sought to be plugged, whose terms of service shall be at option of the county commissioners, but who shall serve until his successor is appointed.

§ 12. Duties concerning plugging wells.

Sec. 2. Whenever it shall become necessary to plug any well as required by law the lessee or operator shall notify in writing the inspector of oil and gas wells at his office or residence, whereupon he shall repair as soon as possible to said well and supervise the plugging thereof.

§ 13. Log of well to be furnished.

Sec. 3. Upon the arrival of the said inspector at the wells to be plugged the lessee or operator shall furnish to the inspector a record of the drilling of said well verified under oath showing a true log of such well.

§ 14. Penalty for violating act.

Sec. 4. Any person, corporation or co-partnership violating any of the provisions of this act shall upon conviction thereof be deemed guilty of a misdemeanor, and upon conviction be fined in a sum of not more than $500 or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

§ 15. Pay of oil inspector.

Sec. 5. The oil well inspector shall receive a sum of $5.00 per well and actual traveling expenses while in performance of

his duties of inspection; provided, also, that the cost of said inspection shall be paid by the owner or operator of said wells.

§ 16. Repealing section.

Sec. 6. All acts or parts of acts in conflict with this act are hereby repealed.

§ 17. Emergency.

Sec. 7. This act shall take effect and be in force on and after its publication in the statute book.

Approved March 11, 1913.

RELATING TO THE OVERFLOW FROM OIL AND GAS WELLS AND DRILLING OPERATIONS AND TO PREVENT THE POLLUTION OF STREAMS.

[House Bill No. 505.]

AN ACT to prevent the waste or overflow of oil, salt water, or other waste from oil wells, gas wells and well drilling operations, and providing penalties and remedies for violations thereof.

Be it enacted by the legislature of the State of Kansas:

§ 1. Befouling water used by a city.

Section 1. That all persons, companies or corporations are hereby prohibited from wilfully, carelessly or negligently permitting or causing any salt water, oil or other polluting substances to flow into any stream, lake or reservoir within the State of Kansas, so as to render said water deleterious for use for domestic purposes, which furnishes any city within said state with its water supply for domestic purposes.

§ 2. Penalty.

Sec. 2. That any violation of section 1 of this act shall be a misdemeanor, punishable by fine of not less than twenty-five

dollars, nor more than one hundred dollars, and each separate day on which said section 1 may be violated shall constitute a separate offense: *Provided,* that all prosecutions under this act must be begun within ninety days after the commission of the offense.

§ 3. When act in force.

Sec. 3. That this act shall take effect and be in force from and after its publication in the official state paper.

Approved February 16, 1917.

Published in official state paper February 19, 1917.

TRANSPORTATION OF OILS.

§ 1. Pipe lines for conveying crude oil as common carriers.
§ 2. Storage of oil for transportation.
§ 3. Charges for transporting oils.
§ 4. Control of board of railroad commissioners over pipe lines.
§ 5. Liability for damages for failing to receive and transport oils.

AN ACT relating to the transportation of oil by means of pipe lines.

[General Statutes, 1909.]

§ 1. Common carrier.

Par. 58. All pipe lines laid, built or maintained for the conveyance of crude oil within the State of Kansas are hereby declared to be common carriers, and said conveyance of said oil shall be in the manner and under the restrictions in this Act provided. (L. 1905, chap. 315, par. 1; Feb. 28; § 3931.)

§ 2. Storage for transportation.

Par. 59. It shall be the duty of every person, firm, association or corporation operating under such pipe line to provide

suitable and necessary receptacles for receiving such oil for transportation and for storage at the place of delivery until the same can be reasonably removed by the consignee, and shall be liable therefor from the time the same is delivered for transportation until a reasonable time after the same has been transported to the place of consignment and ready for delivery to the consignee. It shall be the duty of every such person, firm, association or corporation to receive and forward such oil as shall be offered for shipment in the order of application therefor, upon the applicant's complying with the rules herein provided for as to delivery and payment for such transportation. Such common carrier shall issue to the shipper a certificate showing the actual quantity and specific gravity thereof; but no application for such transportation shall be valid beyond or for a greater quantity than the applicant has ready for delivery at the time of making such application. (Id., par. 2.)

§ 3. Charge for carriage.

Par. 60. It shall be unlawful for any such person, firm, association or corporation to charge for the transportation of such crude oil through its line in excess of the following rates for each barrel of forty-two gallons transported: Six miles and less, five cents; over six miles and not more than fifteen miles, six cents; over fifteen miles and not more than forty miles, seven cents; over forty miles and not more than eighty miles, eight cents; over eighty miles and not more than one hundred miles, ten cents; over one hundred miles and not more than one hundred and fifty miles, fifteen cents; over one hundred and fifty miles and not more than two hundred miles, twenty cents; over two hundred miles and not more than two hundred and fifty miles, twenty-three cents; over two hundred and fifty miles and not more than three hundred miles, twenty-five cents. (Id., par. 3; § 3963.)

§ 4. Control of railroad commission.

Par. 61. The State board of railroad commissioners shall have the general supervision and control over all such persons, firms, associations or corporations in the performance of said business, and shall prescribe reasonable rules for the conduct

thereof, which rules, when prescribed and delivered in writing to any such person, firm, association, or corporation, shall be printed and posted up in a convenient, accessible and conspicuous place at each office, station or place of business where such oil is received or delivered. The State board of railroad commissioners is hereby authorized to prescribe reasonable maximum rates, not exceeding the rates set forth in section 3 hereof, which shall be charged for the transportation of such oil, which rate shall be binding on every such person, firm, association or corporation after its publication in the official State paper: *Provided,* The reasonableness of such rates may be tested by proceedings therefor in any court of competent jurisdiction in this State, and such court shall, upon hearing the same, make such order as shall be proper, and such order may be reviewed by the Supreme Court as other civil proceedings, regardless of sum or value involved; *Provided,* Before beginning such proceedings in court to test such matters, such person, firm, association or corporation shall execute a bond to the State of Kansas in such reasonable sum as the judge of the court in which such matter is brought shall order, conditioned that the person, firm, association or corporation making such application will promptly pay to any shipper the difference between the rate received for transporting oil and the rate finally ordered by such court. When such maximum rates shall be fixed by the State board of railroad commissioners, the rates prescribed in section 3 of this Act shall cease to be of force, and the rates so fixed by the State board of railroad commissioners shall govern, as in this section provided. (Id., par. 4; § 3964.)

§ 5. Liability for damages.

Par. 62. Any such person, firm, association or corporation which shall fail or refuse to accept, transport and deliver oil when offered, up to the full capacity of such pipe line, at rates not to exceed those provided for by this Act, or shall fail, neglect or refuse to obey any rule so established by the State board of railroad commissioners, shall be liable to the person injured by such failure or refusal in the sum of five hundred dollars liquidated damage, together with reasonable attorney's

fees, to be fixed by the court, in case suit shall be brought therefor; such liquidated damages and attorney's fees to be recovered in any court of competent jurisdiction; and in case of any corporation so refusing or failing, the charter board is hereby authorized to revoke the charter or permit to do business in this State of such corporations. (Id., par 5; § 3965.)

GAS.

§1. Piping natural gas.
§2. Provisions for control of gas and oil wells.
§3. Flambeau lights.
§4. Street lighting.—Hours.
§5. Penalty.
§6. Altering or injuring pipes.
§7. Unlawful connections.
§8. Unlawful interference with pipes.
§9. Penalties, violating law.

[General Statutes, 1909, p. 873.]

AN ACT authorizing the owner of lands not in an incorporated city to lay, maintain and operate natural gas pipes for the purpose of furnishing the residents of such lands with natural gas for light and fuel.

§ 1. Piping natural gas.

Sec. 1. Whenever any tract of land not in an incorporated city shall be laid out in lots or other subdivisions as now required by law, the owner of such lands or his assigns is authorized to lay, maintain and operate natural gas pipes along and across the streets and other grounds dedicated by such owner to public use for the purpose of furnishing natural gas for light and fuel to the residents of said land, and for such purpose is authorized to lay, maintain and operate natural gas pipes across any public highway: *Provided*, That the said pipes shall be laid under the surface of said streets, public grounds, and highways, and that said streets, grounds and highways shall be restored so as not to impair their usefulness: *And provided, further*, That nothing herein shall be construed as granting to such owner or his assigns the exclusive right to furnish said residents with natural gas for light and fuel. (L. 1899, chap. 143, § 1; Feb. 22; § 3904.)

An ACT regulating the control of natural gas and oil wells, and to prevent waste of natural gas, altering gas connections, making gas connections without consent, setting fire to gas, and penalties therefor.

§ 2. Control of.

Sec. 2. That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to use or to permit the use of gas by direct well pressure for pumping of oil or for blowing oil out of wells, or for operating any machinery by direct well pressure of gas, or to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes or other safe receptacle for a longer period than two days after gas or oil shall have been struck in such well: *Provided*, That a reasonable time, not exceeding five days, shall be allowed such contractor, owner, lessee, agent, or manager, in addition to said two days, in which to place in said well the casing, tubing, packer's and other appliances necessary to properly operate the same and obtain the products therefrom, or, in case such contractor, owner, lessee, agent, or manager shall not desire to operate such well, to securely enclose the same, so as to prevent the escape of oil or gas therefrom, and thereafter all such gas or oil shall be safely and securely confined in such well, pipes, or other proper receptacle: *And provided, further*, That the provisions of this section shall not be construed to apply to the escape of gas or oil during continuous drilling. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined in the sum of not less than fifty dollars, nor more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than six months, and each day that the violation continues shall constitute a separate offense. (L. 1901, chap. 224, § 1; March 22; § 3905.)

§ 3. Flambeau lights.

Sec. 3. That it shall be unlawful for any company, corporation, or person, for hire, pay, or otherwise, to use natural gas for illuminating purposes in what are known as "flambeau" lights in cities, towns, highways, or elsewhere; pro-

viding, that nothing herein contained shall be so construed as to prohibit any such company, corporation, or person from the necessary use of such gas in what are known as "Jumbo" burners; enclosed in glass globes or lamps, or by the use of other burners of similar character so enclosed as will consume no more than said "Jumbo" burners. (Id., § 2; § 3906.)

§ 4. Street lighting.

Sec. 4. All gas lights made through said "Jumbo" burners enclosed in glass globes or lamps used in all public streets, and elsewhere outside of buildings, shall be turned off not later than eight o'clock in the morning each day such lights or burners are used, and the same shall not be lighted between the hours of eight o'clock a. m., and five o'clock p. m. (Id., § 3.)

§ 5. Penalty.

Sec. 5. Any person, company or corporation violating any of the provisions of sections 2 and 3 of this Act shall be deemed guilty of a misdemeanor, and be fined in the sum of not less than fifty dollars nor more than two hundred dollars. (Id., § 4; § 3908.)

§ 6. Injuring pipes.

Sec. 6. That it shall be unlawful for any person, in any manner whatsoever, to change, injure, extend, or alter, or cause to be changed, injured, extended, or altered, any surface or other pipe or attachment of any kind connecting or through which natural or artificial gas is furnished from the gas mains or pipes of any person, company, or corporation without first procuring from such person, company, or corporation written permission to make such change, extension, or alteration. (Id., § 5; § 3909.)

§ 7. Connections.

Sec. 7. That it shall be unlawful for any person to make or cause to be made any connection or re-connection with the gas mains or surface pipes of any person, company, or corporation furnishing natural gas, or to turn on or off or in any manner interfere with any valve, stop-cock, or other appliance belonging to such person, company, or corporation and

connected with its surface or other pipes, or to alter or injure the orifice of mixers, or to use natural gas for heating purposes except through mixers, without first procuring from such person, company, or corporation a written permit to turn on or off such stop-cock or valve, or to make such connections or re-connections, or to alter or injure the orifice of mixers, or to interfere with the valves, stop-cocks, or other appliances of such person, company, or corporation, as the case may be. (Id., § 6; § 3910.)

§ 8. Interfering.

Sec. 8. That it shall be unlawful for any person or persons to set fire to any gas escaping from wells, broken or leaking mains, pipes, valves, or other appliances used by any person, company, or corporation in conveying gas, or to interfere in any manner with the wells, machinery, or property of any person, company, or corporation engaged in drilling for natural gas or in furnishing the same, unless employed by or acting under the authority or direction of such person, company, or corporation engaged in so furnishing gas. (Id., § 7; § 3911.)

§ 9. Penalties.

Sec. 9. Any person violating any of the provisions of sections 5, 6 and 7, of this Act shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five dollars nor more than one hundred dollars, and shall be liable to the said person, company, or corporation, whose property was so changed, injured, altered, or destroyed, in a civil action for the amount of damages sustained, together with all the costs in the case. (Id., § 8; § 3912.)

KENTUCKY.

CONDEMNATION OF LAND FOR OIL AND GAS.

[Kentucky Statutes, 1903, § 3766a.]

§ 1. Condemnation of land.

All corporations or companies organized for the purpose of constructing, maintaining or operating oil or gas wells or wells or pipe lines or lines for conveying, transporting or delivering oil or gas, or both oil and gas, are hereby vested with the

right and power to condemn lands and material in this Commonwealth, or the use and occupation of so much thereof as may be necessary for constructing, maintaining and operating such pipe line, or lines, and all necessary machinery, pumping stations, appliances and fixtures, including tanks, telephone and telegraph lines, for use in connection therewith, together with the rights of ingress and egress to examine, alter, repair, maintain and operate or remove such pipe line or lines, all such being hereby declared to be a public use; and when any such corporation or company desires to construct oil or gas pipe line or lines, or both, for the purpose of conducting, transporting or delivering oil or gas, or both, over the lands of others, shall be unable to contract or agree with the owner or owners of land or material necessary for its use for said purpose, it may, in the mode prescribed for the condemnation of land for railroads, condemn the use of so much of said land as may be necessary for the purpose of constructing, maintaining and operating such pipe line or lines, and all necessary machinery, pumping stations, appliances and fixtures, including necessary tanks, telephone and telegraph lines, and including rights of ingress and egress to examine, alter, repair, maintain and operate or remove the same. (Act March 20, 1900.)

PLUGGING OIL AND GAS WELLS.

§1. How plugged.
§2. Penalty for neglect.
§3. Repeal.

WHEREAS, It is most injurious and detrimental to oil and gas wells and contiguous and adjacent land, and even detrimental to oil and gas lands in the neighborhood, and especially land in close proximity to an oil well, either dry or producing, that casing be taken from said well without plugging same, so as to prevent the surface water that may enter said well flowing underground to and destroying other oil and gas wells in close proximity to same.

BE IT ENACTED by the General Assembly of the Commonwealth of Kentucky:

§ 1. How plugged.

It shall be unlawful for any person or persons, corporations or companies to abandon any oil or gas wells, either dry or producing, in this Commonwealth, or to remove casings there-

from, whether same be either oil or gas, either producing or dry, or for any cause abandon said well or wells without first plugging the same in a secure manner by placing a plug of pine, poplar or some other material which will prevent said well from becoming flooded, said plug to be placed above the oil-producing sand or sands, and filled in above for the distance of seven feet with sediment or clay and placing upon the same another plug of similar material as that of the first and also placing about ten feet below the said casing another plug of like material as above referred to, seven feet of sediment or clay, and then another plug, all plugs to be securely driven in so that no water can pass the same, before the casing is removed. (Act March 17, 1906, p. 281, § 1.)

§ 2. Penalty.

Any person or persons, corporations or companies refusing or failing to comply with the foregoing provision as provided for in section 1 herein, shall, on conviction, be fined in any sum not less than one hundred dollars, or not more than one thousand dollars, in the discretion of the jury. (Act March 17, 1906, p. 280, § 2.)

§ 3. Repeal.

All Acts or parts of Acts in conflict herewith are hereby repealed. (Act March 17, 1906, p. 280, § 3.)

PETROLEUM, NATURAL GAS AND SALT WATER WELLS.

[Kentucky Statutes, 1903, §§ 3910 *to* 3914.]

§1. Persons not using well to close it, so as to prevent waste.
§2. How abandoned wells to be closed.
§3. Penalty for violation of provision of this law.
§4. Who, besides owner, may close abandoned well.
§5. Person not owner, closing well, may recover costs of owner.

§ 1. Person not using well to close it so as to prevent waste.

That from and after the passage of this Act, any person or corporation, and each and every of them, in possession, whether as owner, lessee, agent or manager of any well in which petroleum, natural gas or salt water has been found, shall, unless

said product is sooner utilized, within a reasonable time, not, however, exceeding three months from the completion of said well, in order to prevent said product wasting by escape, shut in and confine the same in said well until such time as it shall be utilized: *Provided, however,* That this section shall not apply to gas escaping from any well while it is being operated as an oil well, or while it is used for fresh or mineral water. (Act May 14, 1892.)

§ 2. How abandoned wells to be closed.

That whenever any well shall have been shut down for the purpose of drilling or exploring for oil, gas or salt water, upon abandoning or ceasing to operate the same, the person or corporation in possession as aforesaid shall, for the purpose of excluding all fresh water from the gas-bearing rock, and before drawing the casing, fill up the well with sand or rock sediment to a depth of at least twenty feet above the rock which holds the oil, gas or salt water, and drive a round, seasoned wooden plug, at least three feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing; and immediately after drawing the casing, shall drive a round, seasoned wooden plug, at a point just below where the lower end of the casing rests, which plug shall be at least three feet in length, tapering in form, and of the same diameter, at the distance of eighteen inches from the small end, as the diameter of the hole below the point at which it is to be driven. After the plug has been properly driven, there shall be filled on top of the same sand or rock sediment to the depth of at least five feet. (Act May 14, 1892.)

NOTE.—This section is probably repealed. See § 1, Act preceding.

§ 3. Penalty for violation of provisions of this law.

Any person or corporation who shall violate any of the provisions of sections 3910 or 3911 [the two sections just above], shall be liable to a penalty of one hundred dollars for each and every violation thereof, and to the further penalty of one hundred dollars for each thirty days during which said violation shall continue; and all such penalties shall be recovered, with

cost of suit, in a civil action or actions, in the name of the State, for the use of the county in which the well shall be located. (Act May 14, 1892.)

§ 4. Who, besides owner, may close abandoned well.

Whenever any person or corporation in possession of any well in which oil, gas or salt water has been found, shall fail to comply with the provisions of section 3910 [the first section above], any person or corporation lawfully in possession of lands situate adjacent to or in the neighborhood of said well, may enter upon the lands upon which oil, gas or salt water is allowed to escape or waste in violation of said section 3910, and tube and pack said well, and shut in said oil, gas or salt water, and may maintain a civil action in any court of this State against the owner, lessee, agent or manager of said well, and each and every one of them, jointly and severally, to recover the cost thereof. This shall be in addition to the penalties provided by [the next above] section 3912. (Act May 14, 1892.)

§ 5. Person not owner closing well may recover costs of owner.

Whenever any person or corporation shall abandon any well, and shall fail to comply with section 3911 [second section herein], any person or corporation lawfully in possession of lands adjacent to or in the neighborhood of said well, may enter upon the land upon which said well is situated, and take possession of said well, and plug the same in the manner provided by section 3911, and may maintain a civil action in any court of this State against the owner or person abandoning said well, and every one of them, jointly and severally, to recover the cost thereof. This shall be in addition to the penalties provided by section 3912 [second section above]: *Provided*, This section shall not apply to persons owning the lands on which said well or wells are situated, and drilled by other parties; and in case the person or corporation drilling said well or wells is insolvent, then, in that event, any person or corporation in possession of lands adjacent to or in the neighborhood of said well or wells, may enter upon the land

upon which said well or wells are situated, and take possession of said well or wells, and plug the same in the manner provided for in section 3911, at their own expense. (May 14, 1892.)

LICENSES AND TAXES.

§ 1. Tax on oil production.
§ 2. Market value.—How determined.
§ 3. Notice of valuation to be given.
§ 4. When taxes due.—Penalty.
§ 5. Certification to sheriff for collection.
§ 6. To whom taxes are payable.
§ 7. Reports.—Punishment for not making.
§ 8. Pipe line companies to report.
§ 9. Blanks to be prepared by state commissioners.

[Acts, Kentucky Special Session, 1917, p. 43.]

CHAPTER 9.

AN ACT imposing a license or franchise on any person, firm, corporation or association engaged in the production of oil in this State and authorizing counties also to impose such tax for road, school and county purposes; providing methods of determining the amount of tax due and prescribing penalties for a violation of the provisions of the act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. Tax on oil production.

Every person, firm, corporation or association engaged in the business of producing oil in this State, by taking same from the earth, shall, in lieu of all other taxes on the wells producing said oil imposed by law, annually pay a tax for the right or privilege of engaging in such business in this State equal to one per centum of the market value of all oil produced in this State, and such tax shall be for State purposes, and in addition any county in the State may impose a like tax for road purposes, county purposes or school purposes not to exceed one-half of one per centum of the market value of all oil produced in such

county, and the Fiscal court of any county may levy said tax for county purposes and shall determine what fund or funds shall receive the taxes when collected, and when oil is produced in any separate taxing district in a county the Fiscal court shall equitably distribute such taxes between the county and such taxing district.

§ 2. Market value.—How determined.

The State Tax Commission, from the reports hereinafter required to be made and from such other information as it may obtain, shall determine the fair market value of all oil produced in this State by any person, firm, corporation or association, from the date this act goes into effect until the day on which the first report is required to be made and thereafter from the day on which the last report was made until the day when the next report is required to be made. The State Tax Commission shall determine the fair market value of all oil produced in any county in this State and shall certify such value to the county court clerk within ten days after such value has been finally ascertained.

§ 3. Notice of valuation to be given.

It shall be the duty of the State Tax Commission, immediately after fixing such value, to notify the person, firm, corporation or association of the fact and such person, firm, corporation or association shall have ten days from the time of receiving notice to go before said commission and ask a change of the valuation and may introduce evidence, and said commission is authorized to summon and swear witnesses, and after hearing such evidence, the commission may change the valuation as it may deem proper and the action of the commission shall be final.

§ 4. When taxes due.—Penalty.

All the State taxes due under the provisions of this act from any person, firm, corporation or association shall be due and payable thirty days after notice of same has been given by the State Tax Commission, and all taxes due to any county shall be payable thirty days after the certification is made to the county clerk, and every such person, firm, corporation or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent and a penalty of ten per cent. on the amount of tax shall attach and thereafter such tax shall bear interest at the rate of ten per cent. per annum. Any such person, firm, corporation or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action.

§ 5. Certification to sheriff for collection.

It shall be the duty of the county clerk, immediately upon receiving the certification from the State Tax Commission, to certify same to the sheriff or collector for collection.

§ 6. To whom taxes are payable.

All State taxes due under the provisions of this act shall be paid to the State Treasurer, and all county taxes shall be paid to the sheriff or collector.

§ 7. Reports.—Punishment for not making.

Every person, firm, corporation or association engaged in the production of oil in this State within the meaning of this act shall make a report to the State Tax Commission on the first day of July, 1917, and every three months thereafter. The State

Tax Commission shall furnish and prescribe the blanks upon which such reports shall be made. Any person, firm, corporation or association failing to make such report within thirty days after same is due shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day thereafter the report is not made, and such fine may be recovered by indictment or civil action.

§ 8. Pipe line companies to report.

Every pipe line company doing business in this State and receiving oil from any person, firm, corporation or association shall make a report to the State Tax Commission on the first day of July, 1917, and every three months thereafter, showing the quantity of oil received from each person, firm, corporation or association, and said report shall be made upon blanks furnished and prescribed by the State Tax Commission. Any pipe line company failing to make such report for thirty days after the date on which same is required to be made shall be deemed guilty of a misdemeanor, and upon conviction shall be fined $50.00 for each day thereafter that said report is not made, and said fine may be recovered by indictment or civil action.

§ 9. Blanks to be prepared by State Tax Commission.

The blanks prescribed by the State Tax Commission shall be so prepared as to elicit information such as will enable the commission to arrive at the fair market value of all oil produced in this State and in the counties in this State, and such report shall be made by said companies through their chief officer or agent in this State, and shall be duly verified, and if any such officer or agent makes a false report he shall be deemed guilty of false swearing and may be prosecuted.

Approved May 2, 1917.

[Catch-titles in brackets inserted by compiler.]

LOUISIANA.

DEPARTMENT OF MINING AND MINERALS.

§ 1. Creating a department of mining and minerals; how imposed.
§ 2. Duties of deputy and supervisor to enforce laws relating to mining.
§ 3. Qualifications of deputy supervisor.
§ 4. His duty to inspect mines, etc.
§ 5. Emergency.

ACT No. 254.

HOUSE BILL No. 281.

AN ACT to establish a department of mining and minerals, including oil and gas production, to provide for its proper administration, to provide for the service of a supervisor of minerals and assistants; and fixing their duties and salaries; authorizing the prohibition of unsafe and wasteful mining; and providing penalties.

[Acts July 7, 1910. Acts 1910, p. 423.]

§ 1. Creating a Department of Mining and Minerals.—How imposed.

Sec. 1. *Be it enacted by the General Assembly of the State of Louisiana,* That there be and is hereby established a Department of Mining and Minerals, including gas and oil, to consist of the Register of the State Land Office, who shall be Ex-officio Supervisor of Minerals, and one Deputy Supervisor of Minerals, who shall be a person having a practical knowledge of geology, and natural gas, and oil, and who shall be appointed and commissioned by the Governor, on the recommendation of the Conservation Commission, for the period of one year at a time; provided the Ex-officio Supervisor of Minerals shall receive as compensation for the performance of his duty imposed on him by this Act, five hundred dollars per annum ($500.00), and the Deputy Supervisor and such assistants as may be provided to be compensated as hereinafter provided, all to be paid from the Conservation Fund, the Supervisor on his own warrant.

§ 2. Duties of Deputy and Supervisor to enforce laws relating to mining.

Sec. 2. *Be it further enacted, etc.,* That the Supervisor of Minerals shall make inspection, either in person or through the Deputy Supervisor, of all mining operations carried on in this State, particularly that of the production of natural gas and oil, so far as practicable, and shall see that every precaution is taken to insure the health and safety of workmen engaged in mining. He shall see that all the provisions of law pertaining to mining now in force, or hereafter enacted, particularly those provisions pertaining to the drilling of wells and piping and consumption of natural gas and oil, are faithfully carried out, and that the penalties of law are strictly enforced against any person or persons who violates the same.

He shall make an annual report to the Conservation Commission on the first Monday in April of each year, tabulating the number and character of mining operations being carried on in this State, with location and annual production, both in quantity and value; a record of the geological strata passed through in drilling gas and oil wells; the depth at which salt water is reached in the various wells and the height to which it rises so far as practicable.

He shall report the volume of gas and oil produced by each well, and also the initial or rock pressure of the same; the increase or decrease in pressure of the various wells so far as it can be ascertained, and also the increase or decrease in value of gas produced in gas wells; the number of miles of mains laid for the transportation of gas and oil and capacity and course of the same; the amount of capital invested in the oil, gas or other mining industries; and the number of persons employed in the same; the amount of capital invested in manufacturers located on account of natural gas and oil and other minerals, and the number of employees, and other facts or information as the Conservation Commission may require.

§ 3. Qualifications of Deputy Supervisor.

Sec. 3. *Be it further enacted, etc.,* That there shall be appointed by the Governor, upon the recommendation of the Conservation Commission, a person having a practical knowledge of geology and natural gas and oil, and who is not directly

or indirectly interested in mining or in piping or selling natural gas and oil, as Deputy Supervisor of Minerals of the State of Louisiana.

His duty shall be as herein prescribed for the Supervisor of Minerals, and he shall be the chief assistant under the supervision of the Supervisor of Minerals, in carrying out the mining policy of the State. Within ten (10) days after he shall have been commissioned he shall make and execute a bond in the sum of twenty-five hundred dollars ($2,500.00), payable to the Governor of Louisiana, which bond shall be for the faithful performance of duty and shall be approved and filed with the Secretary of State. Such Deputy Supervisor shall devote all his time to the business of supervision of mining.

He shall receive a salary of two thousand dollars ($2,000.00) per annum, and under the supervision of the Supervisor of Minerals shall have an allowance not exceeding one thousand dollars ($1,000.00) per year for office and traveling expenses for himself and such assistants as may be hereinafter provided, which sum shall be paid from the Conservation Fund upon his warrant, countersigned by the Supervisor of Mining.

§ 4. His duty to inspect mines, etc.

Sec. 4. *Be it further enacted, etc.,* That it shall be the duty of the Deputy Supervisor of Minerals to inspect all mining operations carried on in the State, and he shall have power to prohibit any such operations as he may deem unsafe or dangerous to life or property or wasteful of natural resources; reserving a right of appeal by the operator, or operators, or owners, to the Conservation Commission for ten (10) days if notified by such operator or operators, or owner, to the Supervisor at the time they shall receive notice to cease operation.

And any person or persons carrying on any such operations prohibited shall be guilty of a misdemeanor and upon conviction shall pay a fine in any court having jurisdiction of such misdemeanor in a sum of not exceeding one thousand dollars ($1,000.00), or shall be imprisoned in the parish jail a period not exceeding six months at the discretion of the court; and any person or persons in this State owning mines or carrying

on mining operations, or who contracts the same, who refuses to allow the same to be inspected by the Supervisor of Minerals, upon conviction shall be fined in a sum not exceeding five hundred dollars ($500.00); provided, further, that whenever any responsible person shall file with the Supervisor of Minerals an affidavit charging the owner or owners, or operators of such mines, or gas and oil wells, or their employees with the violation of any of the laws regulating mining, or the production of natural oil and gas, and particularly specifying the violation complained of, it shall be the duty of the supervisor to examine and inquire into the alleged violation of the law, as set forth in the affidavit, and if he finds the facts as charged it shall be his duty to see that the law is complied with.

He shall have, and is hereby invested with authority to inquire if all person or persons engaged in mining operations subject to a license tax have procured license and when he shall find any operating without license he shall report the same to the Supervisor of Minerals, who shall proceed according to law to enforce the license tax collections.

§ 5. Emergency.

Sec. 5. *Be it further enacted, etc.*, That this Act shall take effect from and after its passage, and all laws in conflict herewith are hereby repealed. (Approved July 7, 1910.)

PLUGGING WELLS.

§1. Abandoned wells must be plugged; how same shall be done.
§2. Unlawful to permit gas or oil to escape and waste for more than two days.
§3. Supervisor of minerals authorized to prescribe regulations for boring wells for oil and gas.
§4. Penalty.
§5. Adjacent landowners may stop abandoned wells at expense of owner of land where well is located.
§6. Emergency.

ACT No. 190.

HOUSE BILL No. 333.

AN ACT to provide for the conservation of natural gas by regulations to prevent waste in the extraction of oil and gas, and transportation thereof; and to provide penalties.

[Acts July 6, 1910. Acts 1911, p. 313.]

§ 1. Abandoned wells must be plugged; how same shall be done.

1. *Be it enacted by the General Assembly of the State of Louisiana,* That whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person, firm or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been "shot" there shall be placed in the bottom of the hole thereof a plug of well-seasoned pine wood, the diameter of which shall be within one-half inch as great as the hole of such well, to extend at least three feet above the salt water level, where salt water has been struck such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and made tight by the use of drilling plugs. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be well rammed to a point at least four feet above the gas or oil-bearing rock; on top of the stone or sand there shall be placed another wooden plug at least five feet long with diameter aforesaid, which shall be thoroughly rammed and tightened. In case such well has been "shot" the bottom of the hole thereof shall be filled with a proper and sufficient mixture of said, stone and dry cement, so as to form a concrete up to a point at least eight feet above the top of the gas or oil-bearing rock or rocks, and on top of this filling shall be placed a wooden plug at least six feet long, with diameter as aforesaid, which shall be properly rammed as aforesaid. The casing from the well shall then be pulled or withdrawn therefrom, and immediately thereafter a cast-iron ball, eight inches in diameter, shall be dropped in the well, and securely rammed into the shale by the driller or owner of the well, after which not less than one cubic yard of sand pumping or drilling taken from the well shall be put on top of said iron ball.

§ 2. Unlawful to permit gas or oil to escape and waste for more than two days.

2. *Be it further enacted, etc.,* That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well, to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle, for a period longer than two (2) days, next after gas or oil shall have been struck in such well, and thereafter all such gas or oil shall be safely and securely confined in such wells, pipes or other safe and proper receptacles; provided, that this law shall not apply to any well that is being operated for the production of oil and in which the oil produced has a higher salable value in the field than has the gas so lost.

§ 3. Supervisor of Minerals authorized to prescribe regulations for boring wells for oil and gas.

3. *Be it further enacted, etc.,* That the Supervisor of Minerals shall have, and he is hereby invested with, authority to prescribe regulations for the boring of oil and gas wells, to the end that blow-outs, and gas waste, shall be avoided, which regulations shall be followed by drillers.

§ 4. Penalty.

4. *Be it further enacted, etc.,* That any person, firm or corporation, violating the provisions of sections 1 and 2 of this Act or any reasonable regulations provided by the Supervisor of Minerals, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars ($500.00), or shall be imprisoned for a period not exceeding three months, in the discretion of the court.

§ 5. Adjacent owners of land may stop abandoned wells at expense of owner of land where well is located.

5. *Be it further enacted, etc.,* That whenever any person, or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with

the provisions of this Act, any person or corporation lawfully in possession of lands situated adjacent to or in the vicinity or neighborhood of such well may enter upon the lands upon which such well is situated and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section 1 and 2 of this Act, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain a civil action in any court of competent jurisdiction in this State against the owner, lessee, agent or manager of said well, and each of them jointly and severally, to recover the cost and expenses of such tubing and packing, together with attorney's fees and costs of suit. This shall be in addition to the penalties provided by section 4 of this Act.

July 6, 1910.

§ 6. Emergency.

6. *Be it further enacted, etc.,* That this Act shall take effect from and after its passage, and all laws in conflict herewith are hereby repealed.

July 6, 1910.

PROTECTION OF GAS AND OIL FIELDS.

Act 71 of 1906 as amended (Section 1 and 2) by Act 283 of 1910.

§ 1. Wild or wastefully burning wells.
§ 2. Responsibility of well owners.
§ 3. Misdemeanor.
§ 4. Protection of pipe lines.
§ 5. Procedure in the event of abandoning gas wells.
§ 6. Application of act.
§ 7. Emergency.
§ 8. Gas and oil rules and regulations.

AN ACT to protect the natural gas fields of this state; and to provide for closing, capping or plugging of wild, uncontrollable or burning natural gas wells in this state or otherwise preventing the escape and waste of natural gas therefrom by the owners or proprietors thereof after due notice; and providing, that in default of the owners or proprietors doing so after such notice, that the Governor, on complaint to him, shall direct the Board of State Engineers to close, cap or plug the same or otherwise prevent the escape and waste of natural gas therefrom at the expense of the owners or proprietors; and providing that possession of such natural gas well so closed by the State shall be retained by the State until the expense of closing the

same is reimbursed to the State; and making it a misdemeanor for any person to wilfully, and intentionally set fire to any gas well or to negligently permit any natural gas well in his possession or under his management and control to catch on fire or become wild and uncontrollable, or to negligently permit the escape and waste of natural gas therefrom; and making it a misdemeanor to abandon any well in, near or adjacent to any natural gas field, or apparent natural gas field, without first plugging or securing the same to prevent the admission of water into the gas-producing sand and making it a misdemeanor for any person to intentionally or wilfully injure or damage the property, pipes or pipe lines, wells or mains of any natural gas producing company or to intentionally divert gas therefrom; and prescribing penalties therefor.

§ 1. Wild or wastefully burning wells.

Section 1. *Be it enacted by the General Assembly of the State of Louisiana,* That in order to protect the natural gas fields of this State, it is hereby declared to be unlawful and a nuisance for any person, firm or corporation to negligently permit or suffer any natural gas well to go wild or become uncontrollable or wastefully burn and the owner or proprietor or person in possession of any wild, uncontrollable or wastefully burning natural gas well, shall close the same and securely cap it or plug it or otherwise prevent the escape and waste or wasteful burning of natural gas therefrom, after five (5) days' written notice to such owner or proprietor or person in possession to do so; such notice to be given by any person having an interest in stopping such wild, uncontrollable, wasteful or wastefully burning natural gas well; or such notice may be given by any constable or justice of the peace of the parish where such wild or uncontrollable or wasteful or wastefully burning natural gas well may be located, or the demand of any person having an interest in the stopping of the same.

§ 2. Responsibility of well owners.

Sec. 2. *Be it further enacted, etc.,* That whenever such owner or proprietor or person in possession of such wild, or uncontrollable, wasteful or wastefully burning natural gas well, shall be notified to close, cap or plug the same, or otherwise prevent the escape and waste or wasteful burning of natural gas therefrom, he shall in good faith commence the work of so closing or

capping or plugging the same in order to prevent the escape and waste or wasteful burning of natural gas therefrom, within five (5) days from the date of the receipt of such notice as provided for in the first section of this Act; and in the event that the owner or proprietor or person in possession of such natural gas well fails, refuses or neglects to close, plug or cap the same or otherwise prevent the escape and waste or wasteful burning of natural gas or commence in good faith the work of doing so within five (5) days from the receipt of such notice, the Governor, on the written complaint of any person, firm or corporation having an interest in the stopping, plugging or closing of such natural gas well, shall direct the Board of State Engineers to take charge of the work of closing such wild or uncontrollable or wastefully burning natural gas well, and the Board of State Engineers shall then proceed at once to cap or close or plug the same or otherwise prevent the wasteful escape or wasteful burning of natural gas from such well, at the expense of the owner or proprietor thereof; and to secure to the State the cost and expense of such closing, capping or plugging of such well, possession of the same, with sufficient ground adjacent thereto, it belonging to such owner or proprietor, with the rents, revenues and incomes therefrom, shall be retained by the State until the full and final payment of such costs and expense shall be reimbursed to the State, and when such owner or proprietor or person in possession of such well shall pay such cost or expense to the State, less the revenues, rents and incomes derived therefrom by the State while the same was in possession of the State, the State shall restore possession of said well to him provided, in the event that the rents, revenues, and incomes shall not be sufficient to reimburse the State as provided for in this section, then and in that event the cost and expense of closing, capping or plugging of such wild, uncontrollable or wasteful natural gas well, shall operate as a lien and privilege upon all of the property of whatsoever nature of the owner of the said wild well, and the State shall proceed to enforce said lien and privilege by suit before any court of competent jurisdiction, the same as in other like civil actions, and the judgment so obtained shall be executed in the same manner as now provided by law. If the property so seized and sold bring an amount in excess of the cost and expense occasioned by the State as pro-

vided in this section; then and in that event such excess or balance shall be paid over to the owner of such wild gas well.

§ 3. Misdemeanor.

Sec. 3. *Be it further enacted, etc.,* That it shall be a misdemeanor for any person to wilfully and intentionally set fire to any natural gas well or negligently permit or suffer any natural gas well owned by him or under his management and control or in his possession, to catch on fire or go wild or become uncontrollable, or to negligently permit or suffer natural gas to wastefully escape or wastefully burn therefrom; and on conviction thereof shall be fined in a sum not less than five hundred dollars ($500.00) or imprisonment of not less than three (3) months or both, at the discretion of the court.

§ 4. Protection of pipe lines.

Sec. 4. *Be it further enacted, etc.,* That any person who shall intentionally or wilfully injure or damage the property, pipes, pipe lines or mains of any natural gas well belonging to or operated by any natural gas-producing company, or who shall wilfully or intentionally divert the gas from any pipe, main or natural gas well, the property of any such natural gas-producing company, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in the sum of not less than one hundred dollars ($100.00) or imprisonment of not less than thirty (30) days or both, at the discretion of the court.

§ 5. Procedure in event of abandoning gas wells.

Sec. 5. *Be it further enacted, etc.*, That it shall be unlawful for any individual, firm or corporation to abandon any well in or adjacent to a natural gas field or an apparent natural gas field, without first placing a wooden plug, properly made, both above and below the gas-producing sand, to prevent the admission of water into the gas-producing sand or otherwise sufficiently securing such well against the admission of water into the gas-producing sand; and whenever any individual, firm or corporation shall abandon such well without first plugging or securing

the same as provided, to prevent the admission of water into the gas-producing sand, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) or imprisonment of not less than thirty (30) days nor more than four (4) months, or both, at the discretion of the court.

§ 6. Application of act.

Sec. 6. *Be it enacted, etc.,* That the provisions of this act shall apply to any gas well or wells which may be bored or drilled in, near to or adjacent to any natural gas field or to any apparent natural gas field and to any such well or wells which have heretofore already been bored or drilled.

§ 7. Emergency.

Sec. 7. *Be it further enacted, etc.,* That this act shall take effect from and after its promulgation.

§ 8. Gas and oil.—Rules and regulations.

The following rules and regulations were adopted by the Conservation Commission of Louisiana by virtue of authority vested in it through Act No. 127 of 1912, and in order to more fully carry out Acts 172 and 196 of 1910 (relative to the protection and conservation of natural gas and oil in the fields of the State).

1. No person, firm or corporation shall be permitted to drill for oil or gas until permission is first secured from this Commission. Applicants must give location of proposed well in the quarter (1-4) section, township and range.

2. Each well drilled must have a sufficient amount of surface casing in good condition. This string of surface casing is to be properly cemented in order to reduce the danger of blow-outs.

3. No person, firm or corporation having possession or control of any natural gas well, whether as contractor, owner, lessee, agent or manager, shall allow or permit the flow of gas from

any such well to escape into the open air, for a length of time exceeding two hours after it has cleaned itself, and thereafter all such gas shall be safely and securely confined in such wells, pipes or other safe and proper receptacles.

4. It shall be the duty of any person, firm or corporation having the custody or control of any well which has been sunk, for the purpose of obtaining natural gas or oil or exploiting for same, and which has been abandoned or ceased to be operated for utilizing the flow of oil or gas therefrom, and also the owner or owners of the land wherein such well is situated, to properly and securely stop and plug same as follows: A string of pipe shall be brought as near the bottom of the hole as possible and heavy drilling mud pumped down the pipe and circulated in the borehole for a considerable length of time, after which one string of casing can be removed. This process must be repeated for each string of casing until the hole is filled. In cases where high pressure has to be dealt with, the surface casing must also be left in the hole and a plug screwed in the top thereof. Notification must be made to the Commission of the date on which a well is to be abandoned, in order that it can be properly closed under the supervision of the inspector in charge. All expenses incidental to the closing of wells must be borne by the owner or owners.

5. All gas wells making salt water in such quantities as to be considered detrimental to the gas formation must be abandoned and closed.

6. All flambeaux and open lights, except when casing head gas is used, are hereby prohibited. Casing head gas must either be utilized or burned.

7. Gas from the gas strata shall not be used to produce petroleum from oil bearing stratum. Where this method is in operation, ninety days will be allowed for the installation of a different system of raising the oil.

8. It shall be unlawful to use natural gas by expansion, in various appliances, such as engines, pumps, etc., of more than 15 H. P. capacity, when continuously operated. All precautionary measures must be taken to conserve the use of such gas as may be applied to furnishing power by the above method.

9. In piping natural gas from point to point, every precautionary measure possible must be adopted to eliminate all leakage

from pipe fittings and appliances. All piping laid for this purpose must be inspected and approved by the inspector in charge.

10. Every precaution must be taken to avoid the unnecessary waste of both oil and natural gas.

The foregoing rules and regulations were adopted by the Conservation Commission at its meeting on January 28, 1913.

SAVING NATURAL PRODUCTS FROM THE SOIL.

§ 1. License tax.
§ 2. Filing of statements.
§ 3. Must certify facts.
§ 4. Time of delinquency.—Tax additional to other tax.
§ 5. Procedure in absence of reports.
§ 6. Procedure in event of delinquency.
§ 7. Perjury.
§ 8. Forester and forestry advisory board.
§ 9. Rural progress fund.
§ 10. State auditor to supervise collections.
§ 11. Repealing section.

ACT 145 OF 1916.

AN ACT to carry into effect Article 229 of the Constitution of 1898, as amended at the election in November, 1910, by levying an annual license tax upon all persons, firms, corporations or associations of persons engaged in the business of severing natural products from the soil, as timber, turpentine, and minerals, including oil, gas, sulphur and salt; and prescribing the method of collecting the license; requiring all those engaged in the severance of, and dealing in, such products to make reports of their business; to provide for the distribution of funds arising from this Act; to provide for their expenditure under the direction of certain Boards herein created; to provide penalties; and to repeal all laws in conflict herewith.

§ 1. License tax.

Section 1. *Be it enacted by the General Assembly of the State of Louisiana,* That there is hereby levied a license tax for the year 1916, and for each subsequent year, upon each person or association of groups, firms or corporations pursuing the business of severing natural products, including all forms of timber, turpentine and minerals, including oil, gas, sulphur and salt; from the soil; to be collected quarterly by the Tax Col-

lectors as hereinafter set forth, the license for each quarter to be based on the amount severed in the preceding quarter.

§ 2. Filing of statements.

Sec. 2. *Be it further enacted, etc.,* That every such person, firm, association or corporation engaged within the State in the business of severing timber, turpentine, oil, gas, sulphur and salt, from the soil, shall, within thirty days after the expiration of each quarter annual period expiring respectively on the last day of September, December, March and June of each year, file with the State Auditor a statement under oath, on forms prescribed by him, of the business conducted by such person, firm, association or corporation during the last preceding quarter annual period, showing the nature of the natural products so produced, and the gross amount thereof, the actual cash value thereof, and any such information pertaining thereto as the State Auditor may require, and in the case of a mine or gas or oil well, including sulphur and salt, showing the location of each saw mill, timber camp or turpentine camp, or of each mine or farm, tract or lot of land upon which the wells that are actually producing oil, sulphur, salt or other minerals are located; also giving the number of actually producing gas wells on each farm, tract or lot from which said person, firm, association or corporation is selling gas, either for domestic use, manufacturing purposes or making a business of selling it for any purposes whatever. At the time of rendering the said report the said person, firm, association or corporation shall at the same time pay to the Tax Collector of the parish where said product is taken or severed from the soil, a little license to operate in each succeeding quarter, fixed upon the amount of production of the preceding quarter, as follows:

Two and one-half cents (2½) per one thousand (1,000) feet for severing oak and ash timber; four (4) cents per one thousand feet for severing cypress timber; two (2) cents per one thousand (1,000) feet for severing all other kinds of timber; three-fourths (¾) of one (1) cent per barrel for severing oil; ten (10) cents per ton for severing sulphur; two (2) cents per ton for severing salt; and one (1) cent per barrel for severing turpentine; one-fifth (1-5) of one (1) mill per one thousand (1,000) cubic feet for severing gas.

The making of said reports and the payment of said licenses shall be by those actually engaged in the operation of severing, whether it be the owner of the soil, or a lessee who is severing from the soil of another, or the owner of any such resources severing from the soil of another. In all cases where any timber is purchased after the same has been severed from the soil, the purchaser thereof shall make report of the amount and the name of the owner from whom purchased, to the Tax Collector, in order that the Tax Collector may collect the license from the seller of the timber. Such seller of the timber, after it is severed from the soil, shall also make report to the Tax Collector and the Auditor, and pay the license as herein provided.

§ 3. Must certify facts.

Sec. 3. *Be it further enacted, etc.,* That the State Auditor shall have the power to require any such person, firm, association or corporation engaged in severing all such natural products from the soil to furnish any additional information deemed by him to be necessary for the purpose of computing the amount of said tax and for said purpose to examine the books, records and files of such person, firm, association or corporation; and to that end shall have power to examine witnesses, and if any such witnesses shall fail or refuse to appear at the request of the State Auditor, said Auditor shall certify the facts and the name of the witness so failing and refusing to appear to the district court of the State having jurisdiction of the party, and said courts shall thereupon issue a summons to the said party to appear and give such evidence as may be required, for the purpose of ascertaining whether or not any return so made is the true and correct return of the gross receipts of any such person, firm, association or corporation, and whenever it shall appear to the State Auditor that any such person, firm, association or corporation engaged in severing such natural products from the soil has unlawfully made an untrue or incorrect return of its gross receipts, as made hereinbefore provided, he shall ascertain the correct amount of such gross receipts and shall compute said tax on same.

§ 4. Time of delinquency.—Tax additional to other taxes.

Sec. 4. *Be it further enacted, etc.,* That the tax provided for by this act shall become delinquent after the date fixed for each quarter-annual report to be filed in the office of the State Auditor and from such time shall, as a penalty for such delinquency, be subject to similar penalties to those provided in the general license laws of this State; and the payment of the license tax exacted by this act shall be in addition to and shall not affect the liability of the parties so taxed for the payment of all State, municipal, district, parochial and special taxes upon their real estate and other corporeal property; but no other tax in addition hereto shall be imposed upon rights to produce in this State those things whose production is subjected to a license tax by the provisions of this act; except that where the police juries of the several parishes of the State are authorized by existing laws to levy a tax upon the business of severing any of the natural products affected by this act that such police juries may continue to levy such license tax provided that same shall in no case exceed one-half of the amount levied herein for the State.

§ 5. Procedure in absence of reports.

Sec. 5. *Be it further enacted, etc.,* That if any person, firm, association or corporation shall fail to make a report of the gross production of its natural products, upon which the license is herein provided for, within the time prescribed by law for such report, it shall be the duty of the State Auditor to examine the books, records and files of any such person. firm, association or corporation to ascertain the amount and value of such production and to compute the tax thereon as provided herein, and shall add thereto the cost of such examination, together with any penalties accruing therefrom, and to this end he may call upon the Supervisor of Public Accounts to assist in such investigation.

§ 6. Procedure in event of delinquency.

Sec. 6. *Be it further enacted, etc.,* That when any tax provided for in this act shall become delinquent, the State Auditor shall issue an order directed to the sheriff of any parish wherein

the same, or any part thereof, accrued, and the sheriff to whom said order shall be directed shall proceed against the property, assets and effects of the person, firm, association or corporation against whom said tax is assessed in the same manner as he is authorized by the general license law to proceed in the collection of delinquent licenses; collecting penalties as prescribed in general laws.

§ 7. Perjury.

Sec. 7. *Be it further enacted, etc.,* That any person who shall intentionally make any false oath to any report required by the provisions of this act shall be deemed guilty of perjury and shall be subject to all penalties prescribed for said crime.

§ 8. Forester and Forestry Advisory Board.

Sec. 8. *Be it further enacted, etc.,* That one-fifth (1-5) of all licenses herein collected from the severance of timber and turpentine shall be accredited to the Forestry Department of Department of Conservation, and shall be expended upon the warrant of the Commissioner of Conservation, in the execution of the forestry laws, and for such purposes only; provided that such Forestry Department, under the general direction of the Commissioner of Conservation, shall be superintended by a technically trained forester of not less than two years' experience in professional forestry work; provided further, that no expenditure proposed hereunder in executing said forestry laws by the said Commissioner of Conservation shall be made except on the approval of a General Forestry Advisory Board, which is hereby created, and which shall consist of four members to be appointed by the Governor, and of the Commissioner of Conservation, who shall be ex-officio member and chairman. Said membership shall be chosen, two from well-known timber owners, one from farm land owners interested in farm-land reforestation, and the Professor of Forestry in the State University. The said Forestry Advisory Board shall meet quarterly at the domicile of the Department of Conservation, and not oftener, except on call of the Chairman, and shall have no salary, compensation, or per diem, but shall have actual traveling expenses for attendance upon such meetings.

§ 9. Rural Progress Fund.

Sec. 9. *Be it further enacted, etc.,* That one-half (½) of all other licenses collected under this Act shall be accredited to a Rural Progress Fund; and shall be expended under the direction and control of the Commissioner of Agriculture, the Superintendent of Public Education, and the President of the State University in the promotion of rural development in the manner, according to the methods, and for the purposes which said officials shall deem best designed to accomplish such end; provided that the guide and principal in making any outlay shall always be (1) that the funds proposed to be expended are derived from the spoilation of the land and they should be used in the way deemed best to return something to the land; (2) that the depletion of the rural population and the congestion in the cities are destructive to the security of government and the happiness of the people, and any efforts which will tend to prevent so grievous an end are to be encouraged. The several officials shall constitute a Rural Progress Board, without salary, compensation or per diem, but if they shall travel on the business of the board, unconnected with the business of their respective offices, they shall be reimbursed actual expenses incurred from the funds of the board. The Superintendent of Education shall be chairman of the board and shall issue all warrants upon the said Rural Progress Fund for all expenditures deemed necessary to accomplish the purposes aforesaid; but no expenditures shall be made without the approval of a majority of the board. The board shall provide for formal meetings, methodical procedure and permanent records, accurate accounting, and shall make detailed report of its activities and accomplishments, and cause the same to be placed in the hands of the General Assembly not less than twenty (20) days before its biennial meeting.

§ 10. State Auditor to supervise collections.

Sec. 10. *Be it further enacted, etc.,* That Act 41 of 1914, empowering the Conservation Commission to supervise the collection of the license provided for herein is repealed, and all reports required by said Act to be made to the Conservation Commission shall hereafter be made to the State Auditor, as provided herein.

§ 11. Repeal of section.

Sec. 11. *Be it further enacted, etc.,* That all laws and parts of laws, including Act No. 10 passed at this session, in conflict herewith be, and the same are hereby repealed; provided, however, that nothing contained in this Act shall in anywise be construed to deprive the State of whatever right it may have against parties subject to a license tax under Act No. 209 of 1912 and Act 10 of 1916 and other laws; and all rights, interests and titles of the State to any licenses that may be legally due under said Act 209 of 1912, Act 10 of 1916 and other laws, are hereby specially reserved, whether the same be in litigation or not; it being the true intent and purpose of this Act that said Act 209 of 1912, Act 10 of 1916 and other laws, shall remain in full force and effect until such licenses shall become due under this present Act; and no obligation that may be due the State for licenses under said Act 209 of 1912, Act 10 of 1916 and other laws prior to the date when this Act shall go into effect shall in any manner be impaired; provided that all funds collected under this Act, except as above provided, shall be turned into the General Fund; provided further, that if the distribution of the funds above provided for to the Department of Conservation for forestry purposes, and to the Rural Progress Board for rural development, should for any reason be defeated, then such funds shall likewise go into the General Fund.

(Act 10 of 1916 repealed Act 41 of 1914 empowering the Conservation Commission to supervise the collection of licenses on products severed from the soil, placing the supervision in the hands of the State Auditor. It also amended and re-enacted Act 209 of 1912, but the Act cited above, 145 of 1916, subsequently repealed all parts of Act 10 of 1916 in conflict with any of its provisions.)

MONTANA.

§ 1. Release of lease on record.
§ 2. Penalty for failure to release.—Damages.
§ 3. Notice to release.
§ 4. Repealing section.
§ 5. Emergency.

§ 6. Well casing.
§ 7. Filling abandoned well.—Plugging.
§ 8. Penalty.
§ 9. Repealing section.
§ 10. Emergency.
§ 11. Lien for labor and supplies.
§ 12. Subcontractor's lien.
§ 13. How lien acquired.
§ 14. Repealing section.
§ 15. Emergency.

Laws 1917, p. 24.

A bill for an act entitled "An act in relation to the release of oil, gas, and other mineral leases; providing civil remedies in connections therewith. Be it enacted by the legislative assemly of the State of Montana:

§ 1. Release of lease on record.

Section 1. When an oil, gas or other mineral lease heretofore or hereafter executed shall become forfeited, it shall be the duty of the lessee, his successor or assigns, within sixty days from the date this Act shall take effect, if the forfeiture occurred prior thereto and within sixty days from the date of the forfeiture of any and all leases to have such lease released from record in the county where the land is situated without cost to the owner thereof.

§ 2. Penalty for failure to release.—Damages.

Sec. 2. Should the owner of such lease neglect or refuse to execute a release as provided in this Act, then the owner of the leased premises may sue in any court of competent jurisdiction to obtain such release, and he may also recover in such action of the lessee, his successor or assigns the sum of one hundred dollars damages and all costs, together with a reasonable attorney's fee for preparing and prosecuting the suit, and he may also recover any additional damages that the evidence in the case will warrant. In all such actions writ of attachment may issue as in other cases.

§ 3. Notice to release.

Sec. 3. At least twenty days before bringing the action provided for in this Act, the owner of the leased land, either by himself or by his agent or attorney, shall demand of the holder of the lease (if such demand by ordinary diligence can be made in this State) that said lease be released of record. Such demand must be written. When written a letterpress or carbon or written copy thereof, when shown to be such, may be used as evidence in any court, with the same force and effect as the original.

§ 4. Repealing section.

Sec. 4. All Acts and part of Acts in conflict herewith are hereby repealed.

§ 5. Emergency.

Sec. 5. This Act shall be in full force and effect from and after its passage and approval.

Approved February 14, 1917.

Law 1917, page 46.

AN ACT regulating the casing of oil and gas wells, and the mode of plugging the same when abandoned.

Be it enacted by the Legislative Assembly of the state of Montana:

§ 6. Well casing.

Section 1. That the owner or operator of any well put down for the purpose of exploring for and producing oil or gas shall, before drilling into the oil or gas bearing rock, encase the well with good and sufficient wrought iron oil well casing from the lower part of such well, and from penetrating the oil or gas bearing rock. Should any well be put down through the first into a lower oil or gas bearing rock, the same shall be cased in such manner as will exclude all salt water from both upper and lower oil or gas bearing rocks penetrated.

§ 7. Filling abandoned wells.—Plugging.

Sec. 2. The owner of any well, when about to abandon or cease operating the same, for the purpose of excluding all fresh or salt waters from penetrating the oil or gas bearing rock or

rocks, and before drawing the casing, shall fill the well with sand or rock sediment to the depth of two feet below the top of each oil or gas bearing rock, and drive therein a round, seasoned, wooden plug two feet in length, and in diameter equal to the full diameter of the well below the casing and immediately upon drawing the casing, shall fill in on top of such plug with sand or rock sediment to a depth of five feet, and again drive into the well a round, wooden plug three feet in length, the lower end tapering to a point, and to be of the same diameter at the distance of eighteen inches from the smaller end as the diameter of the well below the point at which it is driven; and after such piling has been driven, the well shall be filled with sand or rock sediment to the depth of twenty feet.

§ 8. Penalty.

Sec. 3. Any owner or operator or person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and shall be fined in the sum of not less than one hundred dollars nor more than five hundred dollars for each and every offense, and for a second violation of any of the provisions of the preceding sections of this Act, shall be fined in a sum of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days nor more than six months, or both such fine and imprisonment.

§ 9. Repealing section.

Sec. 4. All Acts or parts of Acts in conflict with this Act are hereby repealed.

§ 10. Emergency.

Sec. 5. This Act shall be in full force and effect from and after its passage and approval.

Approved February 19, 1917.

Law 1917, page 48.

AN ACT relating to liens for labor and materials furnished to owners of leaseholds for oil and gas purposes and for materials and labor for the construction of oil and gas pipe lines.

Be it enacted by the Legislative Assembly of the state of Montana:

§ 11. Lien for labor and supplies.

Section 1. Any person, corporation or co-partnership who shall under contract, express or implied, with the owner of any leasehold for oil and gas purposes, or the owner of any gas pipe line, or with the trustee or agent of such owner, who shall perform labor or furnish material, machinery and oil well supplies used in the digging, drilling, torpedoing, completing or operating or repairing any oil or gas wells, or who shall furnish any oil well supplies or perform any labor in constructing or putting together any other machinery used in drilling, torpedoing, operating, completing or repairing of any gas well, shall have a lien upon the whole of such leasehold or oil pipe line or gas pipe line, so laid for oil and gas purposes, the buildings and appurtenances, and upon the material and supplies so furnished, and upon said oil and gas well for which they were furnished, and upon all the other oil wells, fixtures and appliances used in the operating for oil and gas purposes upon the leasehold for which said material and supplies were furnished and labor performed. Such lien shall be preferred to all other liens or incumbrances which may attach to or upon said leasehold for gas and oil purposes and upon any oil pipe line or gas pipe line, or such oil and gas wells and the material and machinery so furnished and the leasehold for oil and gas purposes and the fixtures and appliances thereon subsequent to the commencement of or the furnishing or putting up of any such machinery or supplies.

§ 12. Subcontractor's lien.

Sec. 2. Any person, co-partnership or corporation who shall furnish such machinery or supplies to a subcontractor under a contractor, or any person who shall perform such labor under a subcontractor with a contractor, or who as an artisan or day laborer in the employ of such contractor, and who shall perform any such labor, may obtain a lien upon said leasehold for oil and gas purposes or any gas pipe line or any oil pipe line from the same tank and in the same manner and to the same extent as the original contractor for the amount due him for such labor, as provided in section 1 of this Act.

§ 13. How lien acquired.

Sec. 3. The liens herein created shall be in course in the same manner, and notice of the same shall be given in the same manner, and the materialman's statement for the lien of any laborer herein mentioned shall be filed in the same manner as now provided by the laws of Montana for materialman's and mechanic's liens, and the method of procedure provided by the laws of the State of Montana for enforcing of materialman's and mechanic's liens, shall be governed by the laws of the State of Montana as now in force, or as may be hereafter inactive.

§ 14. Repealing section.

Sec. 4. All Acts or parts of Acts in conflict herewith are hereby repealed.

§ 15. Emergency.

Sec. 5. This Act shall be in full force and effect from and after its passage and approval.

Approved February 19, 1917.

NEBRASKA.

[Coffey's Annotated Statutes, 1911.]

REWARD FOR DISCOVERY OF OIL.

§ 7351. Reward for discovery of oil.

Provided, further, That whenever it shall be made apparent to the Governor of Nebraska, by affidavit or otherwise by the owner or owners thereof, that crude oil has been discovered by sinking a well or wells, and the output of such well or wells is not less than fifty barrels every twenty-four hours, pumping consecutively for a period of not less than sixty days, it shall be the duty of the Governor to appoint a suitable person to examine the same, whose duty it shall be to report on the location and capacity thereof. In the event such report shows a well or wells to be of a capacity and in a location entitling the same to receive the benefit of this Act, then, in that event, the Governor of Nebraska shall direct the Auditor to draw an order on the Treasurer of the State of Nebraska for the sum of fifteen thousand dollars, to be paid to the owner or

owners of such oil well or wells. Said order to be paid out of the General Fund of the State of Nebraska, as above directed: *Provided, further,* That the expense of such examination and report to the Governor shall be paid by the owner or owners of the well or wells securing the benefit of the provisions of this Act.

(History.—Laws 1875, p. 156, § 2; in force February 23; this and the next section inserted in place of § 2 of the original Act, 1903, ch. 63, p. 359, § 2; in force April 8.)

(This bounty cannot be paid until there is a specific application. State *ex rel.* v. Moore, 50 Neb. 102; 69 N. W. 373; 61 Am. St. R. 538.)

§ 7352. Reward for discovery of gas.

Provided, further, That when it shall be made apparent to the Governor of the State of Nebraska, by affidavit or otherwise, by the owner or owners thereof, that they have discovered a gas field by sinking a well or wells or otherwise, and that such well or wells have a capacity of 500,000 cubic feet for a period of twenty-four hours, and that said well or wells have continued to produce 500,000 cubic feet of gas within the period named, for not less than thirty days, it shall be the duty of the Governor to appoint a suitable person to examine the same, whose duty it shall be to report the probable capacity and geographical location of said gas well or wells by personal examination and measurement of the output thereof, and in the event such report shows the well or wells to be of the capacity above specified, then the Governor of Nebraska shall direct the Auditor to draw an order on the treasurer for the sum of fifteen thousand dollars to be paid to the owner or owners of said gas well or wells, the same to be paid out of the General Fund of the State of Nebraska, as above directed. *Provided, further,* That the expense of such examination and report to the Governor shall be paid by the owner or owners of the gas well or wells securing the benefit of the provisions of this Act.

(History.—Laws 1875, p. 156, § 2; in force February 23; this and the preceding section inserted in place of § 2 of the original Act, 1903, ch. 63, p. 360, § 3; in force April 8.)

NEW YORK.

§1. Abandoned oil and gas wells to be filled up and plugged.
§2. Violation of this Act a misdemeanor.
§3. In case of neglect, adjacent owners may plug well at owner's expense.
§4. Repealing section.

[Acts 1879, p. 295.]

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. Abandoned oil and gas wells to be filled up and plugged.

Par. 1. Whenever any well shall have been put down for the purpose of exploring for and producing oil or gas, upon abandoning or ceasing to operate the same, the owner or operator shall, for the purpose of excluding all water from the oil or gas-bearing rock, and, before drawing the casing, fill up the well with sand or rock sediment to the depth of at least twenty feet above the third sand or oil-bearing rock, in case of an oil well, or any gas-bearing rock, in case of a gas well; and in case of an oil well, drive a round, seasoned wooden plug, at least two feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing, and whether an oil or gas well, immediately after the drawing of the casing, shall drive a round, wooden plug into the well at the point just below where the lower end of the casing shall have rested, which plug shall be at least three feet in length, tapering in form, and to be of the same diameter at the distance of eighteen inches from the smaller end as the diameter of the well below the point at which it is to be driven; after it has been properly driven, shall fill in on top of same with sand or rock sediment to the depth of at least five feet. (As amended April 23, 1893. Acts 1893, p. 490.)

§ 2. Violation of this Act a misdemeanor.

Par. 2. Any person who shall violate the provisions of this Act shall, upon conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine of not less than two hundred nor exceeding five hundred dollars, or by imprison-

ment in the county jail where the conviction shall be had, for a time not exceeding one year, or both such fine and imprisonment, in the discretion of the court before whom such conviction shall be had; one-half of the fine so imposed to be paid to the informer, the residue to the use of the school district in which such well may be situated. (Amended April 14, 1882. Acts 1882, p. 59.)

Par. 3. Section 3 of said Act is hereby amended so as to read as follows:

§ 3. In case of neglect adjacent owners may plug well at owner's expense.

Par. 3. Whenever any owner or operator shall neglect or refuse to comply with the provisions of section 1 of this Act, the owner of, or operator upon, any land adjoining that upon which such abandoned well may be, may enter, take possession of said abandoned well and plug the same, as provided by this Act, at the expense of the owner or operator whose duty it may be to plug the same. (Amended April 14, 1882. Acts 1882, p. 59.)

§ 4. Repealing section.

Par. 4. All Acts or parts of Acts inconsistent or in anywise conflicting with the provisions of this Act, are hereby repealed.

PIPE LINE CORPORATIONS.

§ 40. Incorporation.
§ 41. Location of line.
§ 42. Condemnation of real property.
§ 43. Railroad, turnpike, plank road and highway crossings.
§ 44. Construction across and along canals, rivers and creeks.
§ 45. Consent of local authorities.
§ 46. Construction through villages and cities.
§ 47. Over Indian reservations.
§ 48. Over state lands.
§ 49. Additional powers.
§ 50. Use of line to be public; storage; liable as common carriers; rates and charges.

§ 51. Receipts for property; cancellation of vouchers; delivery of property.
§ 52. Monthly statements.
§ 53. Fences; farm crossings and use of line not inclosed.
§ 54. Taxation of property.

[3 Birdseye Consol. Stat. 6311.]

§ 40. Incorporation.

Twelve or more persons may become a corporation for constructing and operating for public use, except in the city of New York, lines of pipe for conveying or transporting therein petroleum, gas, liquids or any products or property, or for maintaining and operating any line of pipe already constructed and owned by any corporation, person or persons, except in such city, for the public use, by making, signing, acknowledging and filing a certificate stating the name of the corporation, the number of years it is to continue, the places from and to which it is to be constructed or maintained and operated, its length as near as may be, the name of each county through or into which it is to be constructed; the amount of its capital stock, which shall not be less than fifteen hundred dollars for every mile of pipe constructed or proposed to be constructed, and the number of shares of which it shall consist; the number of directors not less than seven, and the names and places of residence of the directors for the first year, and the place of residence of each subscriber and the number of shares he agrees to take in such corporation, which must be in aggregate equal ten hundred and fifty dollars for every mile of pipe constructed or proposed to be constructed and twenty-five per centum of which must be paid in cash. Such certificate shall have indorsed thereon or appended thereto and as a part thereof, an affidavit made by at least three of the directors named therein that at least ten hundred and fifty dollars of stock for every mile of line proposed to be constructed or maintained and operated has been in good faith subscribed, and twenty-five per centum paid in money thereon, and that it is intended in good faith to construct or to maintain and operate the line of pipe mentioned in such certificate, and that such corporation was not projected or formed with the intent or for the purpose of injuring any person or corporation, nor for the purpose of selling or conveying its

franchise to any person or corporation, nor for any fraudulent purpose.

Source—Former Transportation Corps. L. (L. 1890, ch. 566) 40; originally revised from L. 1878, ch. 203, 1, 2, 4, 5.

§ 41. Location of line.

Every such corporation shall before commencing the construction of its pipe line in any county, or any proceeding for the condemnation of real property, plainly and distinctly mark and designate the line adopted and located by it by a line of stakes consecutively numbered and equally distant, and not more than twenty rods from each other, so that each line can be definitely known and ascertained in all places, and make a map and survey of the route so located and staked out, and shall indicate thereon plainly the points where such route crosses each parcel of land to which it has not acquired title by agreement and shall cause such map and survey to be certified by the president and engineer, and filed in the office of the clerk of the county into or through which the line so located and mapped passes, and shall give to the owner or occupant, if he is known or can be ascertained, of every parcel of land through which such route passes, the title to which has not been acquired by purchases, written notice of the filing of such map and survey, stating that such route passes over or across such owner's or occupant's lands, and that the route thereof is indicated thereon by such line of stakes. Any occupant or owner of such lands feeling aggrieved by the proposed location may, within fifteen days after the service of such notice, give ten days' written notice to the corporation, by service upon the president, engineer, or any director thereof, and to the owner or occupant of any lands to be affected by the alteration to be proposed by him, of the time and place of an application to be made by him to a special term of the supreme court in the judicial district in which the lands are situated for the appointment of commissioners to relocate such line. If upon the hearing the court shall consider that sufficient cause exists therefor, it shall appoint three disinterested persons commissioners to examine the route located and the proposed alteration thereof, and direct the mode of proceeding, who shall report to the court the facts relating thereto

and their opinion as to the proposed alteration, and what, if any, alteration should be made in such line, and the court shall thereupon make such order as it shall deem proper in relation to such alteration, and determine the location of such line, and fix and adjust the costs, fees and charges of the commissioners, and the costs and charges of the proceedings, and direct by which party the same shall be paid, and may enforce payment thereof by proceedings as for a contempt of court, for refusal to pay costs directed to be paid by an order of the court, and such order shall be final as to the location of the line upon the lands embraced therein. Such corporation shall not commence the work of constructing or laying its line of pipe, or institute proceeding for the condemnation of real property, in any county until after the expiration of fifteen days from the service by it of the notice herein required, nor until all applications for a relocation of its line in such county, if any are made, have finally determined.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 41, originally revised from L. 1878, ch. 203, 23).

§ 42. Condemnation of real property.

In case such corporation is unable to agree for the purchase of any real estate required for the purpose of its corporation, and its line of pipe in the county in which such real estate is situated has been finally located, it shall have the right to acquire title thereto by condemnation, but such corporation shall not locate or construct any line of pipe through or under any building, dooryard, lawn, garden or orchard, except by the consent of the owner thereof in writing duly acknowledged, nor through any cemetery or burial ground, nor within one hundred feet of any building, except where such line is authorized by public officers to be laid across or upon any public highway, or where the same is laid across or upon any turnpike or plank-road. No pipes shall be laid for the purpose of carrying petroleum, gas or other products or property through or under any of the streets in the cities of this State, unless such corporation shall first obtain the consent of a majority of the property owners on the streets which may be selected for the laying of pipe, and such pipe line shall be located with all reasonable care and

prudence so as to avoid danger from the bursting of the pipes.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 42, originally revised from L. 1878, ch. 203, 14, 34).

References.—Condemnation proceedings, Code Civ. Proc. 3357-3384.

§ 43. Railroad, turnpike, plank-road and highway crossings.

Whenever any line of pipe of any such corporation shall necessarily cross any railroad, highway, turnpike or plank-road, such line of pipe shall be made to cross under such railroad, highway, turnpike or plank-road and with the least injury thereto practicable, and unless the right to cross the same shall be acquired by agreement, compensation shall be ascertained and made to the owners thereof, or the public in case of highways, in the manner prescribed in the condemnation law, but no exclusive title or use shall be so acquired as against any railroad, turnpike or plank-road corporation, nor as against the rights of the people of this State in any public highway, but the rights acquired shall be a common use of the lands in such manner as to be of the least practical injury to such railroad, turnpike or plank-road, consistent with the use thereof by such pipe line corporation, nor shall any such corporation take or use any lands, fixtures or erections of any railroad corporation, or have the right to acquire by condemnation the title or use, or right to run along or upon the lands of any such corporation, except for the purpose of directly crossing the same when necessary.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 43; originally revised from L. 1878, ch. 203, 25).

§ 44. Construction across and along canals, rivers and creeks.

No pipe line shall be constructed upon or across any of the canals of this State, except by the consent of and in the manner and upon the terms prescribed by the superintendent of public works, unless constructed upon a fixed bridge across such canal, at the crossing of a public highway or street with the consent of the public officers having the supervision thereof, or of the municipal authorities of any village or city within

whose limits such bridge may be, nor shall the pipes of any such corporation be laid through or along the banks of any of the canals of this State, nor through or under any of its rivers or creeks, unless such pipe shall be encased so as to prevent leakage, in such manner as shall be approved by the superintendent of public works.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 44; originally revised from L. 1878, ch. 203, 26).

§ 45. Consent of local authorities.

No pipe line shall be constructed across, along or upon any public highway without the consent of the commissioners of highways of the town in which such highway is located, upon such terms as may be agreed upon with such commissioners. If such consent or the consent of the commissioners or municipal authorities required by the preceding section cannot be obtained, application may be made to the appellate division of the Supreme Court of the department in which such highway or bridge is situated for an order permitting the corporation to construct its line across, along or upon such highway, or across or upon such bridge. The application shall be by duly verified petition and notice which shall be served upon the commissioners of highways of the town in which the highway is situated, or the municipal authorities of the village or city where such bridge is located, according to the practice or order of the court, or by an order to show cause, and the court upon the hearing of the application may grant an order permitting the line to be so constructed in such manner and upon such terms as it may direct.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, originally revised from L. 1878, ch. 203, 28).

§ 46. Construction through villages and cities.

No pipe line shall be constructed into or through any incorporated village or city in this State unless authorized by a resolution prescribing the route, manner of construction and terms upon which granted, adopted at a regular meeting of the board of trustees of the village or the common council of the city by a two-thirds vote of such board or council, but such

resolution shall not affect any private right. No pavement shall be removed in any city under the provisions of this article, unless done under the direction of the common council, nor until such corporation shall give a bond in such sum as the common council may require for the replacing of any pavements which shall have been removed. In case any pavement shall have been removed and not properly relaid, the common council may bring suit in any court of record, for the cost of relaying such pavement against any such corporation. No gas house shall be erected in any city under the provisions of this article, for supplying gas to the inhabitants, unless consent is first given by the corporate authorities of the city.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 47; originally revised from L. 1878, ch. 203, 29).

§ 47. Over Indian reservations.

Such corporation may contract with the chiefs of any nation of Indians over whose lands it may be necessary to construct its pipe line for the right to construct such pipe line upon such lands, but no such contract shall vest in the corporation the fee of such lands, nor the right to occupy the same for any purpose other than for the construction, operation and maintenance of such pipe line, nor shall such contract be valid or effectual until the same has been ratified by the county court of the county in which the lands are situated.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 47; originally revised from L. 1878, ch, 203, 27).

Reference.—See note to Indian Law, 2.

§ 48. Over State lands.

The commissioners of the land office shall have power to grant to any pipe line corporation any lands belonging to the people of this State which may be required for the purpose of its incorporation of such terms as may be agreed on by them, or such corporation may acquire title thereto by condemnation, and if any lands owned by any county, city or town be required by such corporation for such purposes, the county, city or town officers having charge of such lands may grant them to such

corporations upon such terms and such compensation as may be agreed upon.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 48; originally revised from L. 1878, ch. 203, 30).

§ 49. Additional powers.

Every corporation formed under this article shall in addition to the powers conferred by the general and stock corporation laws have power:

1. To cause such examinations and surveys of its proposed line of pipe to be made as may be necessary to the selection of the most advantageous route, and for such purpose by its officers, agents or servants may enter upon the lands or waters of any person, upon, through or across which such corporation can construct its line of pipe, under the provisions of this article, subject, however, to liability for all actual damage which shall be done thereto.

2. To take and hold such voluntary grants of real estate and other property, as shall be made to it to aid in the construction, maintenance, operation and accommodation of its pipe line.

3. To lay out its pipe line route not exceeding twelve feet in width, but at the terminations of such line and at all receiving and discharging points and at all places where machinery may properly or must necessarily be set up for the operation of such pipe line it may take such additional width, and for such length as may be necessary.

4. To take and convey through pipes any property, substance or product capable of transportation therein by any force, power or mechanical agency, and to erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the purpose of its incorporation.

5. To regulate the time and manner in which property shall be transported over its pipe lines, and the compensation to be paid therefor, but such compensation shall not exceed the sum or be above the rate of twenty-five cents per hundred miles for the transportation of forty-two gallons of any product transported on lines of one hundred miles in length or over, which shall be reckoned and adjusted upon the quantity or number of

gallons delivered by such corporation at the point to which it shall have undertaken to deliver the same.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 49; originally revised from L. 1878, ch. 203, 33, subd. 1-6).

§ 50. Use of line to be public.—Storage.—Liable as common carriers.—Rates and charges.

The pipe line of every such corporation shall be open for transportation to the public use, and all persons desiring to transport products through such pipe line shall have the absolute right upon equal terms to such transportation in the order of application therefor, on complying with the general requirements of such corporation, as to delivery for any payment of such transportation, but no application for such transportation shall be valid beyond or for a greater quantity of products than the applicant shall then own and have ready for delivery for transportation to such corporation and every such corporation shall provide suitable and necessary receptacles for receiving all such products for transportation, and for storage at the place of delivery until the same can reasonably be moved by the consignee, and shall be liable as common carriers therefor from the time the same is delivered for transportation until a reasonable time after the same has been transported to the place of consignment and ready for delivery to the consignee, which time shall be fixed by general regulation by the corporation, and shall not be less than two days from and after the same shall be ready for delivery and notice thereof given to such consignee, and all rates and charges of every description, for or on account of or in any manner connected with the transportation of any products, shall be fixed by such corporation by general rules and regulations, which shall be applicable to all parties who shall transport any products through such pipe line, or deliver or contract to deliver products for transportation and shall be written or printed and exposed to public view and at all times open to public examination.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 50; originally revised from L. 1878, ch. 203, 33, subd. 7).

§ 51. Receipts for property.—Cancellation of vouchers.—Delivery of property.

No receipt, certificate or order of any kind shall be made, accepted or issued by any pipe line corporation for any commodity unless the commodity represented by them is actually in possession of the corporation at the time of making, issuing or acceptance thereof. Whenever any such corporation shall have parted with the possession of any commodity and received therefor any order, voucher, receipt or certificate, such order, voucher, receipt or certificate shall not be issued or used again, but shall be canceled with the word "canceled" stamped or printed legibly across the face thereof, and such cancel order, voucher, receipt or certificate shall be filed and preserved by such corporation and a record of the same kept by the secretary thereof. No petroleum or other commodity received for transportation by such corporation shall be delivered to any person without the presentation and surrender of all vouchers, receipt, orders or certificate that have been issued or accepted for the same.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 5; originally revised from L. 1878, ch. 203, 42).

§ 52. Monthly statements.

Every pipe line corporation shall make monthly a specific statement showing the amount of all commodities received, the amount delivered during the month, and the stock on hand on the last day of each month of the year, and how much of such stock is represented by outstanding certificates, vouchers, receipts or orders, and how much in credit balances on the book of the corporation. Such statement shall be made on or before the tenth day of the succeeding month and verified by the oath of the president and secretary that it is in all respects true and correct, and shall be filed within three days hereafter in the county clerk's office in the county where the principal office of the corporation is located, and a true copy of the same posted in a conspicuous place in its principal office for at least thirty days thereafter.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 52; originally revised from L. 1878, ch. 203, 41).

§ 53. Fences; farms, crossings and use of line not enclosed.

It shall be necessary for any such corporation to fence the lands acquired by it for the purpose of its incorporation; but, if not enclosed by a substantial fence, the owner of the adjoining land from whom such lands were obtained, his heirs or assigns, may occupy and use lands in any manner not injurious to the interests of the corporation and shall not be liable therefor, or for any trespass upon any such lands except for wilful or negligent injuries to the pipes, fixtures, machinery or personal property of the corporation. If the corporation shall keep such lands enclosed it shall construct and provide all suitable and necessary crossings with gates for the use and convenience of any owners of lands adjoining the portion of its lands so enclosed, and no claim shall be made by it against any owner of adjoining lands to make or contribute to the making or maintaining of any division fence between such adjoining lands and its lands, and if it shall neglect to keep and maintain substantial fences along its lands the owners of adjoining lands may construct and maintain all farm or division fences, and all line of fences crossed by such pipe line in the same manner as though it had not acquired such lands for such pipe lines, and it shall be liable for all injuries to such fences caused or done by any of its officers or agents, or any persons acting in their or its behalf, or by any laborer in its or their employ or in the employ of any of its contractors.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 53; originally revised from L. 1878, ch. 203, 35).

§ 54. Taxation of property.

The real estate and personal property belonging to any pipe line corporation in this State shall be assessed and taxed in the several towns, villages and cities in the same manner as the real estate and personal property of railroad corporations are assessed and taxed, and such corporation may pay such taxes or commute therefor in the same manner as railroad corporations.

Source.—Former Transportation Corps. L. (L. 1890, ch. 566, 54; originally revised from L. 1878, ch. 203, 36).

NATURAL GAS COMPANIES.

§ 1. Acquisition of lands by natural gas company.
§ 2. Pipes in streets, authorized.
§ 3. Consents necessary.
§ 4. Right to enter upon lands.
§ 5. Survey and map.
§ 6. Acquisition of title to lands by condemnation.
§ 7. Compensation must be paid for.

NATURAL GAS CORPORATIONS.

L. 1889. Ch. 422.—"An act to provide for the organization and regulation of natural gas companies, being" an act supplemental to chapter six hundred and eleven of the laws of one thousand eight hundred and seventy-five, entitled "An act to provide for the organization and regulation of certain business corporations."

[3 Birdeye's Consol. Stat. 3591.]

§ 1. Acquisition of lands by natural gas company.

It shall be lawful for any corporation organized under chapter six hundred and eleven of the laws of one thousand eight hundred and seventy-five, and Acts, amendatory thereto, for the purpose of boring, drilling, digging or mining for natural gas and conveying and distributing the same in pipes, and vending said gas to the consumers thereof; to purchase, lease, secure and convey such real estate, and such only, as may be necessary for the convenient transaction of their business, and to effectually carry on the operations of such corporation.

§ 2. Pipes in streets, authorized.

Such corporation is authorized to dig and trench for, and lay their pipes along or under any of the public roads or highways, or through or under any of the waters within the limits of this State; provided the same shall not be so done as to incommode the public use of said highways, or interrupt the navigation of said waters; provided, however, that no pipe-line for the pur-

pose aforesaid shall be constructed across, along or upon any public highway, without the consent of the commissioners of highways of the town in which such highway is located, upon such terms as may be agreed upon with such commissioners, or upon the order of the general term of the Supreme Court of the department in which such highways are situated, made upon petition, and notice to the commissioners of highways of such town, according to the practice, or order of the court, or an order to show cause, and in such manner and upon such terms as shall be ordered by the court.

§ 3. Consents necessary.

No pipe-line shall be constructed into or through any incorporated city or village in this State, unless they be sanctioned by a majority of the common council of such city or trustees of such village by resolution adopted at a regular meeting of such common council, or board of trustees, which resolution shall prescribe the terms upon which consent is granted. Nothing in this or the preceding section shall be construed or held to confer any other right than the relinquishment of the public rights, and the consent of the people to the construction of such pipe-line, and shall not affect any private right.

§ 4. Right to enter upon lands.

When any corporation formed as aforesaid has fully completed its organization, the said corporation, its agents or employees shall be authorized to enter upon any lands for the purpose of making surveys, and to agree with the owner of the property as to the amount of compensation to be paid such owner for the right of laying and maintaining pipes for conveying natural gas on or beneath the surface of said lands.

§ 5. Survey and map.

Before entering upon or using any lands, for the purpose of conveying natural gas as aforesaid; the said corporation shall cause a survey and map to be made of the proposed route of said pipe-line by and on which the lands of each owner and occupant through which the same may run shall be designated, which map shall be signed by the president of said corporation and its secretary, to be filed in the office of the county clerk of the county in which the lands are situated; and the said corporation, by any of its officers, agents and servants, may enter upon any lands for the purpose of making such survey and map.

§ 6. Acquisition of title to lands by condemnation.

In all cases where the said corporation shall be unable to agree with the person owning, or having interest in any lands, for the right to lay gas pipes through the same, the Supreme Court, at any special term thereof, held in the judicial district in which lands are situated, shall on application of the said corporation, after ten days' written notice, personally served on such person, or where such notice cannot be personally served within this State, or such person shall be incapacitated from receiving personal notice, then by service in such manner as the court shall direct, appoint three disinterested citizens of the county in which such lands are situated, who shall be freeholders, as commissioners, to determine the damage sustained by each of said persons, by reason of the use of his or her lands, for the purpose of above recited. Such commissioners shall take the oath required by the constitution of public officers, and shall personally examine each parcel of land proposed to be used, and shall estimate and report to said court at any term thereof held in said judicial district, on ten days' notice served as aforesaid on the parties in interest, the several sums which they shall decide to be just compensation to such owners, or person in-

terested, for the use of such property as aforesaid. Such commissioners may examine witnesses upon hearing before them, and shall have power to administer oaths to such witnesses, and all the evidence they shall take shall accompany their report to the court. On the presentation of such report the said court may confirm or amend or appoint new commissioners, who shall proceed in like manner as the first commissioners, and whose reports, subject to amendment as aforesaid, shall be final and shall be confirmed by said court. Said commissioners shall receive from the said corporation the sum of three dollars per day each, for the time employed by them in the performance of their duties, together with the amount which they shall certify, on their oath, as correct in their said report, for incidental expenses connected with their work, including the preparation of said report.

§ 7. Compensation must be first paid.

Whenever any report of such commissioners shall have been confirmed by the said Supreme Court, the said corporation may deposit, as the court direct, or pay to the said owners or persons, as court directs, the sum mentioned in said report, in full compensation for the right or easement so required and thereupon the said corporation shall be seized of said easement and discharged from all claim by reason of such appropriation and use.

OHIO.

NATURAL GAS, OIL AND MINERAL WATERS.

§ 1. Incasing an oil well, etc.
§ 2. Filling an abandoned well.
§ 3. Failure of owner to comply.
§ 4. Costs and expenses.
§ 5. Confinement of natural gas in well until utilized.
§ 6. Does not apply to oil well.
§ 7. Flambeau lights prohibited.—Other regulations.
§ 8. Proviso.
§ 9. Penalty.

[2 General Code, 1910.]

§ 1. Encasing an oil well, etc.

The owner or operator of a well for the production of petroleum oil, natural gas or mineral waters, before drilling into the oil and gas-bearing rock, shall encase such well with good and sufficient wrought iron casing, so that the surface or fresh water from the lower part of such well will not penetrate the oil or gas-bearing rock. If a well is drilled through the first oil or gas-bearing rock into a lower one, it must be cased so as to exclude all fresh water above the last oil or gas-bearing rock penetrated. (90 v. 24, par. 1; 2 General Statutes 1910, § 6311.)

§ 2. Filling an abandoned well.

The owner or operator of a well constructed for any of the purposes named in the next preceding section, intending to abandon or cease operating it, and before drawing the casing therefrom, shall securely fill such well with rock sediment, or mortar composed of two parts sand and one part cement, to the depth of two hundred feet above the top of the first oil or gas-bearing rock, so as to prevent the surface or fresh water from penetrating to the oil or gas-bearing rock, and the gas and oil from escaping therefrom. (90 v. 24, par. 2; 2 General Statutes 1910, § 6312.)

§ 3. Failure of owner to comply.

If such owner or operator fails to comply, or inefficiently complies with the next preceding section, the owner of the land upon which such well is situated shall forthwith comply therewith. If all the persons heretofore named fail to so fill, or inefficiently so fill such well, any person, after written demand therefor to any of such persons, may enter, take possession of such well and fully comply with such section. (90 v. 24, par. 2; 2 General Statutes 1910, § 6313.)

§ 4. Costs and expenses.

The reasonable cost and expense of so filling such well shall forthwith be paid by such owner or operator, and on his default, by the owner of the land. The amount of such cost and expense shall be a lien upon the fixtures, machinery and

leasehold interest of the owner and operator and upon the interest of the landowner in the land upon which the well is situated, and may be removed and enforced against the owner or operator and the landowner in the order named. (90 v. 24, par. 2; 2 General Statutes 1910, § 6314.)

§ 5. Confinement of natural gas in well until utilized.

A person, co-partnership or corporation, in possession as owner, lessee, agent or manager of a well producing natural gas, in order to prevent the gas wasting by escape, shall shut in and confine the gas therein, within ten days after penetrating the gas-bearing rock, until such time as it is utilized for light, fuel or power purposes. (90 v. 25, par. 3; 2 General Statutes 1910, § 6315.)

§ 6. Does not apply to oil well.

The provisions of the next preceding section shall not apply to an oil well. (90 v. 25, par. 3; 2 General Statutes 1910, § 6316.)

§ 7. Flambeau light is prohibited.

A person, co-partnership or corporation shall not use natural gas for illuminating purposes on flambeau lights; but "jumbo" burners or other burners consuming no more gas than such "jumbo" burners may be so used. A person, co-partnership or corporation consuming natural gas with such burners in the open air or in or around derricks, shall turn it off not later than eight o'clock in the morning of each day such lights or burners are used, and shall not turn on or relight it between the hours of eight o'clock a. m. and five o'clock p. m. (92 v. 78, par. 4; 2 General Statutes 1910, § 6317.)

§ 8. Proviso.

The next preceding section shall not prohibit the burning of flambeau lights within the derrick of a drilling well or for lighting the streets of cities and villages. (92 v. 78, par. 4; 2 General Statutes 1910, § 6318.)

§ 9. Penalty.

A person, co-partnership or corporation violating any provision of this chapter shall be liable to a penalty of one hundred dollars, to be recovered, with costs of suit, in a civil action in the name of the State in the county in which the act was committed or omitted. Such suit may be brought at the instance of a resident of this State without security or liability for costs. Such penalty shall be paid one-half into the school fund of the county in which such suit is brought and one-half to such person at whose instance such suit was brought. (90 v. 25, par. 5; 2 General Statutes 1910, § 6319.)

LEASES.

§1. Leases of natural gas and oil lands to be recorded.
§2. Validity of unrecorded leases.
§3. Parties defendant in suits to cancel leases.

§ 1. Leases of natural gas and oil lands to be recorded.

All leases and licenses and assignments thereof, or of any interest therein, given or made, for, upon, or concerning lands or tenements in this State, whereby any right is given or granted to operate, or to sink or drill wells thereon for natural gas and petroleum or either, or pertaining thereto, shall be filed for record, forthwith, and recorded in such lease record, without delay, and not be removed until recorded. (R. S. § 4112a; 2 General Statutes 1910, § 8518.)

§ 2. Validity of unrecorded leases.

No such lease or license shall have any force or validity until it is filed for record as aforesaid, except as between the parties thereto, unless the person claiming thereunder is in actual and open possession. (R. S. § 4112a; 2 General Statutes 1910, § 8519.)

§ 3. Parties defendant in suits to cancel leases.

The plaintiff in an action to cancel such lease or license, or in any way involving it, shall only be required to make the person or persons defendants, so far as such lease or

license may be involved, who claim thereunder and are in possession as heretofore stated, and those who then appear of record, or by the files in such office, to own or have an interest in such lease or license, fully and finally to adjudicate and determine all questions made or involved therein concerning it. If there be no person in possession and claiming as heretofore specified, and no record or writing or file as heretofore stated and required, then so far as such lease or license is involved, it will only be necessary to make the original lessee or licensee defendant, fully and finally to adjudicate and determine all questions made or involved concerning such lease or license. (R. S. § 4112a; 2 General Statutes 1910, § 8520.)

GAS AND OIL WELLS.

§1. Operator shall make map of coal, gas and oil lands.
§2. Lessor shall make map of coal, gas or oil lands.
§3. Casing and sealing of wells.
§4. Sealing of abandoned wells.
§5. Forfeiture for non-compliance with law.
§6. Penalty.

§ 1. Operator shall make map of coal, gas and oil land.

Upon notice from the chief inspector of mines, or from a district inspector, each person, firm or corporation, engaged in drilling or exploring for natural gas or oil upon land from which coal is being mined, shall make an accurate map thereof, showing the boundaries of each tract of land drilled upon, the buildings and all monuments found upon the premises. Each well shall be plainly marked by a name, number of letter, and located whenever possible with reference to some well-defined and lasting monument. Such map shall contain a sworn statement of the person, firm or corporation operating such oil or gas wells that it is a true representation of the property. Within sixty days after such notice, a copy of such map shall be filed in the office of the chief inspector. (R. S. § 306-1; 1 General Statutes 1910, § 943.)

§ 2. Lessor shall make map of coal, gas or oil land.

Before mining for coal, each person, firm or corporation leasing land for such purposes, upon which gas or oil wells

have been drilled to, or below any seams or veins of such coal, shall make, or cause to be made, and file in the office of the chief inspector of mines such a map as is desired in the preceding section. (R. S. § 306-2; 1 General Statutes 1910, § 944.)

§ 3. Casing and sealing of wells.

If a person, firm or corporation sinks a well for gas or oil through a mine in which coal or other mineral is being mined, the person drilling such well shall drill it to a depth of not less than ten feet below the vein of coal or other mineral, case such hole and seal it upon the outside of the casing with suitable material to the level of the coal floor. Each vein of mineral coal being mined, pierced by such well, shall be sealed in the same manner. (R. S. § 306-3; 1 General Statutes 1910, § 945.)

§ 4. Sealing of abandoned wells.

Before abandoning or ceasing to operate a well drilled for oil or gas, which passes through a vein of mineral coal, and before drawing the casing therefrom, the owner of such well shall seal it by driving in such well to a depth of not less than ten feet below the floor of the lowest coal measure, a round, seasoned, wooden plug at least three feet in length, and equal in diameter to the diameter of the well at that point. On the top of such plug he shall fill at least seven feet of sediment or drillings, or cement and sand. Upon abandoning or ceasing to operate a gas or oil well which passes through any gas or oil-bearing rock lying above the coal measures, the owner of such well or his agent shall drive to a point as near as possible to the top of the coal vein a dry wooden plug not less than two feet in length, and equal in diameter to the diameter of the hole. On the top of such plug, he shall fill at least five feet of sediment or drillings, or cement and sand, as a mine inspector shall direct. (R. S. § 306-4; 2 General Statutes 1910, § 946.)

§ 5. Forfeiture for non-compliance with law.

Each person, firm or corporation, failing to comply with any of the provisions of the preceding four sections, shall be subject to a forfeiture of not less than one hundred nor more

than two hundred dollars, to be recovered by action in the name of the State, and on collection paid into the court of common pleas of the county wherein any such well is located or of Franklin county. (R. S., § 406-5; 2 General Statutes 1910, § 947.)

§ 6. Penalty.

Whoever violates any provisions of such four sections shall be fined not less than fifty dollars, nor more than two hundred dollars, or be imprisoned not less than ten days nor more than thirty days, or both. (2 General Statutes 1910, § 948.)

[Senate Bill No. 167.]

AN ACT to amend sections 973, 914 and 976 of the General Code, relative to the location of oil and gas wells, the abandonment of such wells, the inspection of the same and the interpretation of "coal bearing and coal producing township."

[Acts 1917, p. 630.]

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That sections 973, 914 and 976 of the General Code be amended to read as follows:

§ 1. Map shall be made showing location of oil and gas wells in coal producing townships.

Sec. 973. Any person, firm or corporation holding property in any coal bearing or coal producing township, in any county of the state of Ohio, either in fee, by virtue of a lease for oil or gas, mining purposes since January first, 1900, or otherwise, whereon wells have been drilled for oil, gas or test purposes, shall cause to be made by a competent engineer, an accurate map on a scale of not less than one inch to four hundred feet, showing on said map the location and number of wells as near as same can be located, that have been drilled, whether or not any of such wells have been previously abandoned, or were drilled and abandoned by former operators, who have ever held the said property for oil, gas or mining purposes.

Names and addresses of owners and adjoining owners shall be shown.—Filing of copy.

Said map shall show the name and address of the person, firm or corporation owning said well or wells, the county and township, the names of the adjoining property owners, and lines of the property operated with the distances of the wells properly measured therefrom and checked from the section and quarter section lines, as will be necessary for an accurate survey. The map shall show all the engineer's notations of angles, distances, starting points, or corner stones, together with the numbers given the respective wells, giving a legend as to the manner in which various abandoned or producing wells, are designated. The original map shall be retained by the owner or his agent, and one copy filed with the industrial commission of Ohio, division of mines, said copy showing thereon the sworn statement of the engineer making the map, that same is correct.

Limitation with respect to mine opening.

No oil well, gas well or test well shall be drilled nearer than three hundred feet to any opening to a mine used as a means of ingress or egress for persons employed therein, nor nearer than one hundred feet to any building or inflammable structure connected therewith, and actually used as a part of the operating equipment of said mine.

Application before drilling and contents thereof.

Any person, firm or corporation before drilling or causing to be drilled any oil well, gas well or test well within the limits of any coal producing township in any county of the state of Ohio, shall first file an application with the industrial commission of Ohio, division of mines, on blanks to be furnished by said commission for such purpose, and shall show the following: The name and address of the applicant, the proper date, location of the proposed well—giving the name of the property owner, section number, township and county, the number of the proposed well, and signed by an officer or agent of such operator. No well shall be commenced until the applicant or operator has been

granted a permit, which shall be granted by the industrial commission of Ohio, division of mines, under the following conditions:

Granting of permits.

If such proposed well is located within the limits directly adjacent to mining operations, such limits to be determined by the industrial commission of Ohio, division of mines, the application for permit must be accompanied by a map showing the location of the proposed well and answering the requirements in the preceding regulations for mapping.

If such proposed well is not located within the limits directly adjacent to mining operations, but within the limits of any coal producing or coal bearing township, the industrial commission of Ohio, division of mines, shall grant a permit immediately upon receipt of the application, providing the applicant is a responsible person, firm or corporation. The industrial commission of Ohio, division of mines, may at any time after the well is commenced, if the responsibility of the applicant or operator is considered doubtful, cause such operator or applicant to show proper guaranty of his intention to fulfill the requirements of this section, or cause all operations to cease forthwith. If any person, firm or corporation continues drilling on property already surveyed in accordance with the preceding requirements, a complete blue print or copy of map shall be made at the end of each year ending June 30, showing the additional wells properly surveyed by a competent engineer as above mentioned, and filed with the industrial commission of Ohio, division of mines, not later than the following first of September.

Duties when well is to be abandoned.

When any oil well, gas well or test well is to be abandoned, the person, firm or corporation owning such well shall notify the industrial commission of Ohio, division of mines, or the deputy oil and gas well inspector of the district in which the well is located, as many days in advance as will be necessary for the inspector to arrange to be present at such abandonment. No well shall be abandoned without an inspector being present, unless

permission has been first granted upon good cause shown, by the industrial commission of Ohio, division of mines.

Plugging of abandoned wells.

When any oil well, gas well or test well is to be abandoned, it must first be plugged in some secure manner above the oil or gas sand or rock formation, either by placing or driving one or more good seasoned wooden plugs, or a lead plug, as the case may require, so that no gas or oil may escape, or any water or destructive matter force itself into the oil or gas sand, or rock formation. Upon such seasoned wooden plug or plugging material shall be filled at least thirty feet of cement properly mixed with sand, or thirty feet of good clay or rock sediment properly prepared.

If any well has passed through a workable vein or seam of coal, it shall when it is abandoned be plugged in the following manner: A seasoned wooden plug shall be driven to a point thirty feet below the lowest workable seam of coal and the hole filled with cement to a point at least twenty feet above this seam of coal, at which point another wooden plug shall be placed and the hole filled for a distance of twenty feet with cement or properly prepared clay, or rock sediment. If there is more than one seam of coal the next seam above must be plugged off in like manner.

Casing when well penetrates mine.

In the event that a well being drilled penetrates the excavations of any mine, it must be cased with casing of approximately the same diameter as the diameter of the hole, the hole to be drilled thirty feet or to solid slate or rock and not less than ten feet below the floor of such mine, and the casing shall be placed in the following manner: One string of casing shall be placed at a point above the roof of said mine so as to shut off all of the surface water; then the hole drilled through said mine and another string of casing put in. The bottom of the second string of casing, or the one passing through said mine, shall not be nearer than ten feet, or more than thirty feet from the floor of the mine where it passes through the same.

When any well which has been drilled is to be abandoned and has passed through the excavations of any coal mine from which the minable coal has not all been removed, the person, firm or corporation owning said well shall leave in said well the casing passing through said mine from a point not less than ten feet, nor more than thirty feet below the floor of said mine, and extending above the roof of said mine at least five feet. A seasoned wooden plug shall be driven to a point at least forty feet below the floor of the mine and the hole above said plug together with the casing left in, which extends through the coal, shall be filled with cement; then a seasoned wooden plug shall be driven on the top of said casing, and the hole filled with cement for a distance of not less than twenty feet.

Words "coal bearing or coal producing township" interpreted.

A coal bearing or coal producing township of any county shall be interpreted to mean any township as a unit, in which coal is found that is being mined, or is of such thickness as to make it likely to be mined at some future time. Any well drilled in such township, whether or not it passes through any coal, the same being barren in certain sections of such township, or the well being commenced below the line of outcrop of the coal, will nevertheless be required to be mapped and abandoned in accordance with the regulations and provisions of this section as given above, which shall apply uniformly throughout any coal bearing or coal producing township of any county.

§ 2. Designation of townships by inspectors.

Sec. 914. The chief deputy inspector of mines and the oil and gas well inspector shall designate the townships in the various coal producing counties of Ohio, which shall be considered coal bearing or coal producing townships, to be included under the regulations as prescribed in section 973 relating to the mapping, drilling and abandonment of oil, gas or test wells. The chief deputy inspector of mines shall allow all matter pertaining to the mapping and drilling of oil and gas wells to be under the direct supervision of the oil and gas well inspector, except when wells

are to be drilled, or have been drilled directly adjacent to some mining operation, or in case any arrangement for the drilling of an oil or gas well must necessarily be made in mutual understanding and consideration with some mining operation, or whenever the proper protection of the coal deposits is in question.

Supervision of granting of permit and filing maps.

The oil and gas well inspector shall supervise the granting of permits to drill or abandon a well, the filing and reprinting of maps of oil, gas or test wells, and see that all the provisions relating to the mapping, drilling, and abandonment of such wells are strictly complied with. In any case where the plugging method as outlined in section 973 cannot be applied, or if applied, would be found ineffective in carrying out the intended protection, which the law is meant to give, the oil and gas well inspector may designate the method of plugging to be used, in all such cases causing the abandonment report to show the manner in which the work was done.

Designation of counties composing districts.

The oil and gas well inspector shall designate the counties or townships thereof which shall compose the different districts of the respective deputy oil and gas well inspectors, or change such districts whenever in his judgment the best interests of the service so demands. He shall issue instructions and regulations for the government of the deputy inspectors as will be consistent with the powers and duties vested in them by law, and secure the proper protection which the law intended. The oil and gas well inspector shall give such personal assistance to the deputy inspectors as they may need and make such personal inspection as he deems necessary throughout all the districts, at any time.

Enforcement of regulations.

Each deputy oil and gas well inspector shall carry out the instructions of the oil and gas well inspector with reference to the enforcement of the regulations provided in section 973, or other regulations that are deemed necessary to insure the pro-

tection which this section intends. Any person, firm or corporation dissatisfied with the ruling of the chief deputy inspector of mines, or the oil and gas well inspector under the provisions of this section shall have the right of appeal to the industrial commission of Ohio within ten days from the date of such ruling.

§ 3. Penalty when coroner refuses or neglects to comply with provisions of law.

Sec. 976. Any county coroner who, after receiving notice of a fatal accident, or of an accident which has resulted in the death of a person, at, in, or around a mine, from the owner, lessee or agent of such mine, or the chief inspector of mines, wilfully refuses or neglects to comply, so far as such provisions relate to him, with the provisions of section nine hundred and twenty-one of the General Code, shall, upon conviction thereof, be fined not less than twenty-five dollars nor more than fifty dollars, at the discretion of the court.

Penalty when owner, lessee, agent, etc., neglects or refuses to comply with provisions of law.

Any owner, lessee or agent of a mine, or any person, firm or corporation opening a new mine, having written knowledge of a violation of this act, who wilfully refuses or neglects to comply with the provisions of sections nine hundred and twenty-two, nine hundred and twenty-three, nine hundred and twenty-four, nine hundred and twenty-five, nine hundred and twenty-six, nine hundred and twenty-seven, nine hundred and twenty-eight, nine hundred and twenty-nine, nine hundred and thirty, nine hundred and thirty-one, nine hundred and thirty-two, nine hundred and thirty-three, nine hundred and thirty-four, nine hundred and thirty-seven, nine hundred and thirty-eight, nine hundred and thirty-nine, nine hundred and forty, nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, nine hundred and forty-five, nine hundred and forty-six, nine hundred and forty-seven, nine hundred and forty-eight, nine hundred and forty-nine, nine hundred and fifty, or nine hundred and seventy-one of the General Code, shall, upon conviction thereof, be fined not less than twenty-five dollars

nor more than fifty dollars, and for a second or any subsequent offense shall be fined not less than fifty dollars nor more than one hundred dollars, at the discretion of the court.

Superintendent, mine foreman, etc.

Any superintendent, mine foreman, foremen or overseer, who wilfully refuses or neglects to comply, so far as such provisions relate to each of them with the provisions of sections nine hundred and fifty-one, nine hundred and fifty-two, nine hundred and fifty-three, and nine hundred and fifty-four of the General Code, shall, upon conviction thereof, be fined not less than ten dollars nor more than twenty-five dollars, and for a second or subsequent offense shall be fined not less than ten dollars nor more than twenty-five dollars, or imprisoned not less than ten days nor more than twenty days, or both, at the discretion of the court.

Entering mine generating fire-damp.

Any person or persons who wilfully refuses or neglects to comply with the provisions of section nine hundred and fifty-five of the General Code, or enters a mine generating fire-damp before it is reported by the fire boss that it is safe for persons to enter, or goes beyond a danger signal indicating an accumulation of fire-damp, as forbidden by the provisions of section nine hundred and fifty-nine of the General Code, shall, upon conviction thereof, be fined not less than twenty-five dollars nor more than fifty dollars, and for a second or any subsequent offense shall be fined not less than twenty-five dollars nor more than fifty dollars, or imprisoned not less than ten days nor more than twenty days, or both, at the discretion of the court.

Any person or persons who violates the provisions of sections nine hundred and fifty-six, nine hundred and fifty-seven, nine hundred and fifty-eight, nine hundred and sixty, nine hundred and sixty-one, nine hundred and sixty-two of the General Code, or violates the provisions of section nine hundred and fifty-nine of the General Code other than to enter a mine generating fire-damp, before the fire boss reports it safe, or to go beyond a danger signal indicating an accumulation of fire-damp, shall, upon conviction thereof, be fined not less than five dollars, nor

more than ten dollars, and for a second or any subsequent offense shall be fined not less than five dollars nor more than ten dollars, or imprisoned not less than five days nor more than ten days, or both, at the discretion of the court.

Loitering or having intoxicants.

Any person who wilfully violates the provisions of sections nine hundred and sixty-four, nine hundred and sixty-five, nine-hundred and sixty-six, nine hundred and sixty-seven or nine hundred and seventy of the General Code or violates the provisions of section one hundred and fifty-nine of the General Code relating to loitering and intoxicants, at, in or around a mine, shall, upon conviction thereof, be fined not less than five dollars nor more than ten dollars, or imprisoned not less than five days nor more than ten days, or both, at the discretion of the court.

Pulling material without plugging.

Any person, firm or corporation who violates or wilfully refuses or neglects to comply with the provisions of section 973, shall, upon conviction thereof, be fined not less than one hundred dollars, nor more than five hundred dollars, and for a second or any subsequent offense shall be fined not less than two hundred dollars and not more than one thousand dollars, or imprisoned not less than thirty days nor more than six months, at the discretion of the court. In addition, if the material is pulled out of a well which was not plugged in accordance with the provisions of section 973, the person, firm or corporation causing such offense may be made to clean out such well and properly plug the same, or pay the entire reasonable cost of such work being done under orders of the industrial commission of Ohio, division of mines, within thirty days.

Sale of illuminants not specified.

Any person, firm or corporation who compounds, sells or offers for sale to dealers any oil or paraffine wax, fish oil or any other illuminant whatever, other than those specifically provided for

in section 974, General Code, unless with the consent and approval of the chief inspector of mines, for illuminating purposes in any mine in this state contrary to the provisions of sections nine hundred and seventy-four and nine hundred and seventy-five of the General Code, shall, upon conviction thereof, be fined not less than fifty dollars nor more than one hundred dollars, and for a second or any subsequent offense shall be fined not less than one hundred dollars nor more than two hundred dollars, or imprisoned not less than thirty days nor more than sixty days, or both, at the discretion of the court.

Sale with approval of chief inspector of mines.

Any person, firm or corporation who sells, or offers for sale to any employe of a mine for illuminating purposes in a mine any oil or paraffine wax, fish oil or any other illuminant, other than those specifically provided in section nine hundred and seventy-four of the General Code, unless with the consent and approval of the chief inspector of mines, contrary to the provisions of section nine hundred and seventy-four and nine hundred and seventy-five of the General Code, shall, upon conviction thereof, be fined not less than twenty-five dollars nor more than fifty dollars, and for a second or any subsequent offense shall be fined not less than twenty-five dollars nor more than fifty dollars, or imprisoned not less than ten days nor more than twenty days, or both, at the discretion of the court.

Use of illuminants not specified.

Any person who knowingly uses for illuminating purposes in a mine, any oil or paraffine wax, fish oil or any other illuminant whatever other than those specifically provided for in section nine hundred and seventy-four of the General Code, unless with the consent and approval of the chief inspector of mines, contrary to the provisions of sections nine hundred and seventy-four and nine hundred and seventy-five of the General Code, shall, upon conviction thereof, be fined not less than five dollars nor more than ten dollars, and for a second or any subsequent offense shall be fined not less than five dollars nor more than ten dollars, or imprisoned not less than five days nor more than ten days, or both, at the discretion of the court.

§ 4. The sectional numbers herein are in conformity to the General Code.

Sec. 2. That said original sections 973, 914 and 976 of the General Code be, and the same are hereby repealed.

JOSEPH McGHEE, *Attorney General.*

E. J. HOPPLE, *Speaker of the House of Representatives.*

EARL D. BLOOM, *President of the Senate.*

JAMES M. COX, *Governor.*

Passed March 21, 1917.
Approved March 31, 1917.
Filed in the office of the Secretary of State at Columbus, Ohio, on the 2d day of April, A. D. 1917. 180G.

OKLAHOMA.

[Taken from Snyder's Compiled Laws, §§ 4809-4855.]

ARTICLE I. Gas pipe lines.
II. Oil pipe lines, etc.
III. Use and preservation.—Inspection.
IV. Inspection of oils.
V. Ownership of natural gas.—Output.
VI. Natural gas waste.
VII. Production and sale of oil.—Powers of corporation commission.
VIII. Regulation of production and transportation of natural gas.
IX. Meter regulations.

ARTICLE I.

GAS PIPE LINES.

§ 4809. Domestic corporations.
§ 4810. Same.—Charter for.—Stipulation.
§ 4811. Foreign corporation, prohibited.
§ 4812. Denied right of eminent domain, except when.
§ 4813. Construction of gas lines, how.
§ 4814. Inspector to direct.—Expenses how paid.
§ 4815. Regulation of pressure.
§ 4816. Charter forfeited, when.—Receiver appointed.
§ 4817. Lines constructed for public sale, inspected first.
§ 4818. Pipe lines permitted, when.
§ 4819. Repeal.

AN ACT regulating the laying, constructing and maintaining and operation of gas pipe lines for the transportation of natural gas within the State of Oklahoma, defining the modes of procedure for the exercise of the right of eminent domain for such purposes, providing for the inspection and supervision of the laying of such pipe lines and limiting the gas pressure therein, and providing penalties for the violation thereof.

§ 4809. Domestic corporations.

Any firm, co-partnership, association or combination of individuals may become a body corporate under the laws of this State for the purpose of producing, transmitting or transporting natural gas to points within this State by complying with the general corporation laws of the State of Oklahoma, and with this Act. (L. 1907-8, p. 586.)

§ 4810. Same.—Charter for.—Stipulations.

No corporation organized for the purpose of, or engaged in the transportation or transmission of natural gas within this State shall be granted a charter or right of eminent domain, or right to use the highways of this State unless it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this State; that it shall not connect with, transport to, or deliver natural gas to individuals, associations, co-partnerships, companies or corporations engaged in transporting or furnishing natural gas to points, places, or persons outside of this State. (L. 1907-8, p. 586.)

§ 4811. Foreign corporations—prohibited.

Foreign corporations formed for the purpose of, or engaged in the business of transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this State. (L. 1907-8, p. 586.)

§ 4812. Denied right of eminent domain—except when.

No association, combination, copartnership or corporation shall have or exercise the right of eminent domain within this State for the purpose of constructing, or maintaining a gas pipe line or lines within this State, or shall be permitted to take private or public property for their use within this State, unless expressly granted such power in accordance with this Act. (L. 1907-8, p. 587.)

§ 4813. Construction of gas lines—how.

The laying, constructing, building and maintaining of gas pipe line or lines for the transportation or transmission of nat-

ural gas along, over, across or through the highways, roads, bridges, streets, or alleys in this State, or of any county, city, municipal corporation, or any other private or public premises within this State is hereby declared an additional burden upon said highway, bridge, road, street or alley, and any other private, or public premises may only be done when the right is granted by express charter from the State and shall not be constructed, maintained, or operated until all damages to adjacent owners are ascertained and paid as provided by law. (L. 1907-8, p. 587.)

§ 4814. Inspector to direct.—Expenses—how paid.

All pipe lines for the transportation or transmission of natural gas in this State shall be laid under the direction and inspection of proper persons skilled in such business to be designated by the chief mine inspector for such duty, and the expenses of such inspection and supervision shall be borne and paid for by the parties laying and constructing such pipe lines for the transportation or transmission of natural gas. (L. 1907-8, p. 587.)

§ 4815. Regulation of pressure.

No pipe line for the transportation or transmission of natural gas shall be subjected to a greater pressure than three hundred pounds to the square inch, except for the purpose of testing such lines, and gas pumps shall not be used on any gas pipe line for the transportation or transmission of natural gas or used (on or) in any gas well within this State. (L. 1907-8, p. 587.)

§ 4816. Charter forfeited—when.—Receiver appointed.

Any corporation granted the right under the provisions of this Act to exercise the right of eminent domain, or use the highways of this State to construct or maintain a gas pipe line or lines for the transportation or transmission of natural gas to points within this State, which shall transport or transmit any natural gas to a point outside of, or beyond this State, or shall connect with or attempt to connect with or threaten to connect with any gas pipe line furnishing, transporting, or

transmitting gas to a point outside of, or beyond this State, shall, by each or all of said acts, forfeit all right granted it or them by the charter from the State, and said forfeiture shall extend back to the time of the commission of said act or said acts in violation of this Act; and such act or acts shall of themselves work a forfeiture of any and all rights or any and every kind and character which may be or may have been granted by the State for the transportation or transmission of natural gas within this State, and all property of said corporation and all the property at any time belonging to said corporation, at any time used in the construction, maintaining or operation of said gas pipe line or lines shall, in due course of law, be forfeited to and be taken into the possession of the State through its proper officer and in said action there shall be a right to the State of the appointment of a receiver, either before or after the judgment, to be exercised at the option of the State, and the officers taking possession of said property shall immediately disconnect said pipe line or lines at a proper point in this State from any pipe line or lines going out of, or beyond the State. And said property shall be sold as directed by the court having jurisdiction of said proceedings, and the proceeds of said sale shall be applied, first to the payment of the cost of such proceedings, and the remainder, if any, paid into the school fund of the State, and said charter under which said act or acts were committed shall be revoked, and no charter for the transportation or transmission of natural gas shall never (ever) be granted to any corporation having among it (its) stockholders any person who was one of the stockholders of said corporation whose charter has or may have been forfeited as aforesaid, and if any such charter shall have been granted, and thereafter a person shall become a stockholder thereof who was one of the stockholders of the corporation whose charter has been or may have been forfeited, as herein provided, the charter of said corporation, one of whose stockholders is as last named, shall therefore be forfeited and revoked: *Provided*, That any person who may be denied the right to become a stockholder as above prescribed may be granted the right to become such stockholder by the Corporation Commission, when such person shows to such commission that he was not a party to the former violation of this Act. (L. 1907-8, p. 587.)

§ 4817. Lines constructed for public sale—inspected first.

No pipe lines for the transportation or transmission of natural gas shall be laid upon private or public property when the purpose of such line is to transport or transmit gas for sale to the public until the same is properly inspected as provided in this Act; and before any gas line company shall furnish or sell gas to the public, it shall secure from the inspector (a certificate) showing that said line is laid and constructed in accordance with this Act, and under the inspection of the proper officer, provided, that nothing in this Act shall be construed to prevent persons drilling for oil and gas from laying surface lines to transport or transmit gas to wells which are being drilled within this State, and further, provided, that factories in this State may transport or transmit gas through pipe lines for their own use for factories located wholly within this State, upon securing the right of way from the State, over or along the highways and from property owners to their lands. (L. 1907-8, p. 589.)

§ 4818. Pipe lines permitted—when.

That no person, firm, or association, or corporation shall ever be permitted to transmit or transport natural gas by pipe lines in this State, or in this State construct or operate a pipe line for the transmission of natural gas, except such persons, firms, associations, or corporations be incorporated as in this Act provided, except as in section 9 of this Act (4817); and provided, further, that all persons, firms, corporations, associations and institutions now doing the business of transporting or transmitting natural gas in this State and otherwise complying with this Act are hereby permitted to incorporate under the provisions of this Act within ten days after the passage and approval of the same. (L. 1907-8, p. 589.)

§ 4819.—Repeal.

All Acts and parts of Acts in conflict with this Act are hereby repealed. (L. 1907-8, p. 589.)

ARTICLE II.

OIL, PIPE LINES, ETC.

§4820. All business relating to petroleum limited by this Act.—Exception.
§4821. Eminent domain.—Conditions.
§4822. Common purchaser.—Duties.—Who exempt.
§4823. Common carrier of petroleum, discrimination by.
§4824. Non-acceptors of this Act must dispose of property.
§4825. Acceptance of Act condition precedent.
§4826. Benefits of Act conferred on whom.—Eminent domain.
§4827. Extended time for filing plats.
§4828. Penalties imposed.
§4829. Evidence.
§4830. Suspension of punitive provisions.
§4831. Extension of time, when.

AN ACT to regulate all corporations, associations, and persons engaged in this State, in the business of carrying crude petroleum, or its products through pipe lines; to regulate operators of oil wells and refiners of crude petroleum and its products, regulating the purchasing of mineral oil by pipe lines, providing punishments for violation thereof, and declaring an emergency.

§ 4820. All business relating to petroleum limited by this Act. —Exceptions.

Every corporation, joint stock company, limited co-partnership or other person, now or hereafter exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, by or through pipe line or lines, for hire, compensation or otherwise, or now or hereafter exercising or claiming the right to engage in the business of producing crude oil or petroleum, or of refining it, or manufacturing any of its products thereof, or of storing crude oil or petroleum now or hereafter produced by it, or any other person or persons, or now or hereafter engaging in the business of buying, selling or dealing in crude oil or petroleum, within the limits of this State, shall not have or possess the right to conduct or engage in said business or operations, in whole or part, as above described, or have or possess the right to locate, maintain or operate the necessary pipe lines, fixtures and equipment thereunto belonging, or used in connection therewith, concerning the said business of carrying or transporting crude oil or petroleum as aforesaid, on, over, along, across, through, in or under any present or future highway, or part

thereof, within this State, or have or possess the right of eminent domain, or any other right or rights concerning said business or operations, in whole or in part, except as authorized by and subject to the provisions of this Act; except, further, and only such right or rights as may already exist which are valid, vested, and incapable of revocation by any law of this State or the United States. The word "petroleum," as used herein, means all crude oil and its manufactured products, not including natural gas. (L. 1909, S. B. 168. Took effect March 27, 1909.)

§ 4821. Eminent domain.—Conditions.

For the purpose of acquiring necessary right of way, every such person is hereby granted the right of condemnation by eminent domain, and the use of the highways in this State, for the purpose of transporting petroleum by pipe lines, and the location, laying, construction, maintaining and operation thereof.

Corporations of other States or Territories, or of the United States, otherwise admissible to do business in this State, may get the benefit of this Act upon compliance with the laws and Constitution, but until such compliance shall have no rights in, on, or under the highways.

The word "person," as used in this Act, means any natural person, partnership, or association of persons, or any corporation organized under the laws of the State of Oklahoma. (L. 1909, S. B. 168. Took effect March 27, 1909.)

§ 4822. Common purchaser.—Duties.—Who exempt.

Every corporation, joint stock company, limited co-partnership, partnership, or other person, now or hereafter claiming or exercising the right to carry or transport crude oil or petroleum or any of the products thereof, by pipe line or pipe lines, for hire, compensation, or otherwise, within the limits of this State, as allowed by, and upon compliance with the requirements of this Act, as owner, lessee, licensee, or by virtue or any other right or claim, which is now engaged or hereafter shall engage in the business of purchasing crude oil or petroleum therein, shall be a common purchaser thereof, and shall purchase all of the petroleum in the vicinity of, or which may

be reasonably reached by its pipe lines, or gathering branches, without discrimination in favor of one producer or one person as against another, and shall fully perform all the duties of a common purchaser; but if it shall be unable to perform the same, or be legally excusable from purchasing and transporting all of the petroleum produced, then it shall purchase and transport petroleum from each person and producer ratably, in proportion to the average daily production, and such common purchasers are hereby expressly prohibited from discriminating in price or amount for like grades of oil, or facilities as between producers or persons; and in the event it is likewise a producer, it is hereby prohibited from discriminating in favor of its own production, or storage, or production or storage in which it may be interested directly or indirectly in whole or in part, and its own production and storage shall be treated as that of any other person or producer.

All persons, firms, associations, and corporations are exempted from the provisions of this Act where the nature and extent of their business is such that the public needs no use in the same, and the conduct of the same is not a matter of public consequence, and for this purpose the district courts of the State and the corporation commission are hereby vested with jurisdiction to determine such exemptions in any action or proceeding properly before them, as prohibited in this Act. (L. 1909, S. B. 168. Took effect March 27, 1909.)

§ 4823. Common carrier of petroleum—discrimination by.

Every corporation, joint stock company, limited co-partnership, partnership or other person, now or hereafter engaged in the business of carrying or transporting crude oil, or petroleum, or any of the products thereof, for hire or compensation or otherwise, by pipe line or pipe lines within this State, and by virtue of and in conformity to, any valid law incapable of revocation by any law of this State or of the United States, or by virtue of and in conformity to the provisions of this Act, shall be a common carrier thereof as at common law, and no such common carrier shall allow or be guilty of any unjust or unlawful discrimination, directly, or indirectly, in favor of the carriage, transportation, storage or delivery of any crude, stock or storage oil, or any products thereof, in its possession

or control, or in which it may be interested, directly or indirectly. (L. 1909, S. B. 168. Took effect March 27, 1909.)

§ 4824. Non-acceptors of Act must dispose of property.

It shall be unlawful for any corporation, joint stock company, limited co-partnership, partnership or other persons, now or hereafter engaged in the business of carrying or transporting crude oil or petroleum, or any of the products thereof, for hire or compensation, or otherwise, within the limits of this Act, and not becoming a common purchaser as defined by, and accepting the provisions of this Act, to own or operate, directly or indirectly, any oil wells, oil leases, or oil holdings or interests in this State, after six months next after the approval of this Act, and each and every of said corporations, joint stock companies, limited co-partnership, partnership or other person, shall divest themselves of all legal or equitable ownership, interest or control, directly or indirectly, in oil well or wells, oil leases or oil holdings or interests in this State. (L. 1909, S. B. 168. Took effect March 27, 1909.)

§ 4825. Acceptance of Act condition precedent.

Before any corporation, joint stock company, limited co-partnership, partnership or other person, shall have, possess, enjoy or exercise the right of eminent domain, right of way, right to locate, maintain or operate pipe lines, fixtures or equipment thereunto belonging, or used in connection therewith, as authorized by the provisions of this Act, or shall have, possess, enjoy or exercise any right (the word "right" in this connection being used in its most comprehensive legal sense) conferred by this Act, every such corporation, joint stock company, limited co-partnership, partnership or other person, shall file in the office of the said Corporation Commission a proper and explicit authorized acceptance of the provisions of this Act and the Constitution of this State, and in cases of pipe lines a plat showing in detail the points within this State between which, and the route along which, the trunk line or trunk lines to be constructed, the intended size and capacity thereof, and the location and capacity of all pumping stations, gate valves, check valves and connections and appliances of all kinds used, or to be used, on said trunk

line or lines; and upon demand of the Corporation Commission the proper party or parties, as required by said commission, shall properly file a plat showing in detail all the lines owned and operated by them respectively, with full and explicit information as to their capacity, of their pumping stations, gate valves, check valves, and connections, of all kinds, respectively required or used in operation thereof. (L. 1909, S. B. 168. Took effect March 27, 1909.)

§ 4826. Benefits of Act conferred on whom.—Eminent domain.

Every domestic pipe line company in this State is hereby given authority to build, construct, lay and maintain oil pipe lines over, under, across, or through all highways, bridges, streets or alleys in this State or any public place therein under the supervision of the inspector of oil and gas wells and pipe lines as to where and how in said highways, bridges, streets, alleys and public places said pipe lines shall be laid, subject to the control of the local municipalities, as to how the business of distribution in that municipality shall be conducted, and subject to responsibility as otherwise provided by law for any negligent injury thereby caused.

All persons, natural or artificial, except foreign corporations, shall have the right of eminent domain, and any right or privilege hereby conferred, when necessary to make effective the purposes of this Act, and the rights thereby conferred. Foreign corporations organized under the laws of any other State, or the United States, and doing or proposing to do business in this State, and which shall have become a body corporate pursuant to or in accordance with the laws of this State, and which, as hereby provided, shall have registered its acceptance of the terms hereof, shall receive all the benefits provided by this Act. (L. 1909, S. B. 168. Took effect March 27, 1909.)

§ 4827. Extended time for filing plats.

Upon a sworn statement of the necessities which would justify a judicial continuance, the Corporation Commission is authorized to extend the time for the filing of the said plats, not, however, to exceed sixty days. (L. 1909, S. B. 168. Took effect March 27, 1909.)

§ 4828. Penalties imposed.

Any person, co-partnership, or corporation, its agent or employee, violating any of the provisions of this Act, or any order of the competent courts of this State, or the Corporation Commission, pursuant to the jurisdiction conferred by this Act, shall upon conviction thereof, be fined a sum of not less than one thousand dollars, nor more than five thousand dollars, or imprisonment for not less than six months, nor more than one year, or by both such fine and imprisonment for each and every violation of this Act; but in case the monthly runs or takings or transportations of oil shall average so as to be without discrimination, as herein provided, the transaction or transactions of any particular day, week, or portion of a month shall be disregarded; and the competent court of the county in which the omission of commission, which is a violation of this Act, has occurred, shall have jurisdiction of any action under the penal code for the punishment thereof; and that said penalties shall not be exclusive of civil liability.

Whenever the operation of a valid order of a competent court or the Corporation Commission is duly suspended, according to law, the punitive provisions of this Act shall likewise be suspended in their operation as to the transactions adjudicated in said court, and, further, any court having jurisdiction of an action brought by the State to punish for a violation under the terms of this Act shall not impose a punishment therefor greater than five hundred dollars against either a person, or corporation, if it finds from the evidence that the violation of any of the provisions of this Act, or of the order of any competent court or of the Corporation Commission, in any proceedings to carry out the provisions thereof. (L. 1909, S. B. 168. Took effect March 27, 1909.)

§ 4829. Evidence.

A properly certified transcript of the report of any such corporation, association, or person shall, as against the maker or makers thereof, be *prima facie* evidence of the truth of any matter therein contained. (L. 1909, S. B. 168. Took effect March 27, 1909.)

§ 4830. Suspension of punitive provisions.

Whenever the operation of the order of such court or Corporation Commission is duly suspended, according to law, the punitive provisions of this Act shall likewise be suspended in their operation as to the transaction adjudicated in said courts. (L. 1909, S. B., 168. Took effect March 27, 1909.)

§ 4831. Extension of time—when.

For good cause shown, the Corporation Commission is authorized to extend the time within which this Act shall operate as to any particular corporation, association, or person not to exceed nine months after the same becomes effective. (L. 1909, S. B. 168. Took effect March 27, 1909.)

ARTICLE III.

USE AND PRESERVATION—INSPECTION.

§4832. Gas to be confined.—Proviso.
§4833. Permitting leak unlawful.
§4834. Certain cases prohibited.
§4835. Daytime consumption.
§4836. Same.—Meter.
§4837. Polluting streams.
§4838. Abandoned wells plugged.—Manner.
§4839. Chief deputy inspector oil and gas.—Duties.
§4840. Deputy to supervise plugging.
§4841. Same.—Duties to owner.
§4842. Certain acts prohibited.
§4843. Penalties prescribed.
§4844. Eminent domain by pipe-line corporations.
§4845. Same.—Domestic corporations.
§4846. Use of highways, etc.—Supervisions.—Duties.
§4847. Repealing clause.
§4848. Casing.
§4849. Wells abandoned shall be plugged.
§4850. Injury from neglect or refusal to comply.
§4851. Violation of law.
§4852. Time in which to comply with this Act.
§4853. Storm burners.
§4854. Accidents.
§4855. Penalties.

AN ACT to regulate the use and preservation of oil and gas and providing penalties for the violation thereof, providing for an inspector, his duties, compensation and appropriation therefor, and declaring an emergency.

§ 4832. Gas to be confined.—Proviso.

Any person, co-partnership, or corporation in possession, either as owner, lessee, agent or manager of any well producing natural gas, in this State in order to prevent the said gas wasting by escape, shall immediately after this Act takes effect, and immediately after penetrating the gas-bearing rock, in any well hereafter drilled, shut in and confine the gas in said well until and during such time as the gas therein shall be utilized for lights, fuel or power purposes: *Provided,* This shall not apply to any gas well operated for oil; *provided, also,* that when in the course of drilling gas production is developed, four days' free time shall be allowed in which to determine whether the well shall be shut and saved for a gas well or drilled in further for the purpose of producing oil. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4833. Permitting leak unlawful.

It shall be unlawful for any person, co-partnership, or corporation, either as owner, lessee, agent or manager of any pipe line in this State, through which natural gas flows from wells utilized for the production of gas only, to allow any unnecessary leak or waste to occur from said line. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4834. Certain uses prohibited.

It shall be unlawful to use natural gas for illuminating purposes in what are known as flambeau lights; but nothing herein shall prohibit the use of "Jumbo" burners or other burners in glass globes consuming no more gas than such "Jumbo" burners, nor the burning of flambeau lights not to exceed four in number within or near the derrick of any drilling well. (L. 1909, H. B. Took effect March 27, 1909.)

§ 4835. Daytime consumption.

The person, persons, firm, company or corporations consuming said gas, and using burners in open air or in or around

derricks shall turn off said gas not later than eight o'clock in the morning of each day such lights or burners are used, and shall not turn on or relight the same between the hours of eight o'clock a. m. and five o'clock p. m. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4836. Same.—Meter.

No gas shall be used or burned for illuminating purposes between the hours of eight o'clock a. m., and five o'clock p. m., unless the use of the same is regulated by meter. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4837. Polluting streams.

No inflammable product from any oil or gas well shall be permitted to run into any tank, pool, or stream used for watering stock; and all waste of oil and refuse from tanks or wells shall be drained into proper receptacles at a safe distance from the tanks, wells or buildings, and be immediately burned or transported from the premises, and in no case shall be it be permitted to flow over the land. Salt water shall not be negligently allowed to flow over the surface of the land. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4838. Abandoned wells plugged—manner.

All lessees or operators drilling or operating for crude oil or natural gas within the State of Oklahoma shall immediately in a practical and workmanlike manner under the supervision of the oil and gas inspector, as hereinafter provided, plug all dry or abandoned oil and gas wells in which oil or gas-bearing stratum has been found in the following manner: Beginning at the bottom of the hole, same shall be solidly filled with crushed rock or sand pumpings, or both, to a point of twenty-five feet above the top level of the oil or gas-bearing sand; at that point a wooden plug of seasoned pine two feet in length and not less than one-half inch in diameter less than the inside diameter of the hole at that point shall be placed; thereafter the hole shall be filled up solidly twenty-five feet farther with a substance consisting of one-third portion of cement and two-thirds portion of sand, properly mixed with water; thereafter, another wooden plug of seasoned pine two feet in

length and not less than one-half inch in diameter less than the inside diameter of the hole at the point shall be placed; thereafter the hole shall be filled up solidly twenty-five feet further with crushed rock and said sand pumpings, or both; and, *Provided, further,* that all such wells drilled to the Mississippi Line shall be plugged above the Mississippi Line in the same manner as provided for herein above, as to the plugging of wells in the upper oil and gas-bearing stratum, all abandoned wells shall immediately be closed and marked, and, *Provided, further,* that when any such lessee or operator removes the derrick from and around such wells, he shall plug such wells in some good and substantial manner, at least ten feet below the surface and fill such well from that point to the surface with such material as will prevent the well from caving before final abandonment. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4839. Chief deputy inspector of oil and gas.—Duties.

The chief mine inspector shall appoint, subject to removal by him, such deputies of practical experience in operating and drilling oil and gas wells, and who are not directly or indirectly interested in the production of oil or gas as may be necessary to the full and prompt performance of the duties required by law. The chief inspector or his deputies shall personally supervise the using and operating of natural gas in this State, and the proper observance of the laws of the State dealing with the drilling for and production of oil and gas, or the piping, storage, purchase and use thereof in this State, and shall promptly report any violation of such laws of (to) the county attorney of the county in which such violation may occur. Said chief mine inspector shall designate one of his deputies to be chief deputy inspector of oil and gas wells and pipe lines, and all duly appointed deputies shall reside at places convenient for the performance of their duties, and a record of their residence shall be kept on file in the office of the chief mine inspector, and be open to the inspection of all persons interested.

The chief deputy inspector of oil and gas wells and pipe

lines shall receive a compensation not to exceed two thousand ($2,000) dollars per annum and necessary traveling and maintenance expenses while absent from home in the performance of their duties. (As amended May 17, 1913, Acts 1913, p. 459.)

§ 4840. Deputy to supervise plugging.

Whenever it becomes necessary to plug any well as required by law, the lessee or operator thereof shall at once notify, in writing, the inspector of gas and oil wells at the office of the Chief Mine Inspector or by personal written notification to the inspector of gas and oil wells at his residence, whereupon said inspector, or his deputy, shall repair to said well and supervise the plugging thereof. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4841. Same.—Duties of owner.

Upon the arrival of said inspector, or his deputy, at the well to be plugged, the lessee or operator thereof shall furnish the inspector a record of the drilling of said well verified under oath, showing a true and correct log of the well. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4842. Certain acts prohibited.

It is hereby declared to be unlawful for any person or persons maliciously to set fire to any gas or oil escaping from wells, broken or leaking mains, pipes, valves, tanks or other appliances, used by any person, company or corporation in conveying gas or oil, or to interfere in any manner with the wells, pipes, mains, gate boxes, valves, stop-cocks, or other appliances, machinery or property of any person, company, or corporation engaged in furnishing gas or oil unless employed by or acting under the authority and direction of any such person, company or corporation owning or operating said gas or oil lines or the proper legal authorities. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4843. Penalties prescribed.

Any person, co-partnership, or corporation violating any of the provisions of this Act, shall upon conviction thereof, be fined in any sum not less than twenty-five dollars, nor more than five hundred dollars, in any court having competent jurisdiction in the county in which the act shall have been committed or omitted, or by being imprisoned for not less than thirty days nor more than ninety days, or by both such fine and imprisonment. The amount of said penalty, when collected shall be paid one-half into the public road fund, of the county in which said suit shall have been brought, and one-half to the informer in said action. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4844. Eminent domain by pipe line corporation.—Conditions.

Before any gas pipe line corporation shall acquire any right of way, or exercise right of eminent domain within this State, or construct any pipe lines for the transportation of gas, it shall file in the office of the Corporation Commission a plat showing in detail the points in this State, between, and the route along which its trunk line is proposed to be constructed, the intended size and capacity thereof, and the location and capacity of all pumping stations, gate valves, check valves and connections of all kinds on said trunk lines; and upon the demand of the Corporation Commission they shall file a plat showing in detail all the lines owned or operated by them, with full information as to their capacity and size, location and capacity of their pumping stations, gate valves, check valves and connections of all kinds in existence. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4845. Same.—Domestic corporations.

All domestic gas pipe line corporations in this State are hereby authorized to build and operate, and for that purpose to acquire, whether by purchase or the exercise of eminent domain, sites for the erection of pumping stations in this State wherever the same may be necessary, due consideration being had for the size, capacity, pressure, facilities and powers of all other gas pipe line corporations and gas consumers and

gas producers, in the same gas district which may be affected by the use of said pumps. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4846. Use of highways, etc.—Supervision.—Duties.

Every domestic gas pipe line corporation in this State is hereby given authority to build, construct and maintain gas pipe lines, over, under, across or through all highways, bridges, streets or alleys in this State, or any public place therein under the supervision of the inspector of oil and gas wells and pipe lines as to where and how in said highways, bridges, streets, alleys and public places said pipe lines shall be laid, subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted, and subject to responsibility as otherwise provided by law. *Provided, however,* that whenever any gas pipe line crosses the land or premises of any one outside of a municipality, said corporation, shall upon request of the owner of said premises connect said premises with a pipe line and furnish to said consumer at the same rate as charged in the nearest city or town. (L. 1909, H. B. 238. Took effect March 27, 1909.)

§ 4847. Repealing clause.

All Acts and parts of Acts in conflict herewith are hereby repealed. (L. 1909, H. B. 238. Took effect March 27, 1909.)

NOTE.—The following sections of Chapter 26, L. 1905, relate in part, semble, to the matters provided for in some of the foregoing sections of this article, e. g., as to plugging, and are perhaps *pro tanto* superseded.

AN ACT to protect and regulate the drilling and operation of oil and gas wells in Oklahoma Territory.

§ 4848. Casing.

The owner or operator of any well put down for the purpose of exploring for or producing oil or gas, shall, before drilling into the oil or gas-bearing rock, encase the well with good and sufficient casing, and in such manner as to exclude all water from above from penetrating the oil or gas-bearing rock. Should any well be put down through the first into a lower oil or gas-bearing rock the same shall be cased in such manner as to exclude all fresh or salt water from both

upper or lower gas-bearing rocks penetrated. (L. 1905, p. 309.)

§ 4849. Wells abandoned shall be plugged.

The owner of any well, when about to abandon or cease operating the same, for the purpose of excluding all fresh or salt water from penetrating the oil or gas-bearing rocks, and before drawing the casing, shall fill the well with sand or rock sediment to the depth of ten feet above the top of each oil or gas-bearing rock, and drive therein a round, tapered, seasoned wooden plug at least two feet in length, and in diameter equal to the full diameter of the well below the casing, and immediately upon drawing the casing shall fill in on top of such plug with sand or rock sediment to the depth of five feet, and again drive into the well a round wooden plug three feet in length, the lower end tapering to a point, and to be of the same diameter at the distance of eighteen inches from the smaller end as the diameter of the well above the point at which the casing rested and the plug is driven; and after such plug has been driven, the well shall be filled with sand or rock sediment to the depth of not less than twenty feet. (L. 1905, p. 310.)

§ 4850. Injury from neglect or refusal to comply.

Whenever any person may be injured by the neglect or refusal to comply with the provisions of section 2 of this Act (4849), it shall be lawful for such person, after notice to the owner, lessee, or caretaker of the premises upon which such well is located, to enter upon and fill up and plug such well in the manner herein provided, and thereupon to recover the expense thereof, from the person or persons whose duty it was to plug or fill up such well in like manner, as debts of such amounts are recoverable, and shall have a lien upon the fixtures and machinery and leasehold interests of the owner or operator of such well. (L. 1905, p. 310.)

§ 4851. Violation of law.

Any person violating the provisions of section 2 of this Act (4849), shall be deemed guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine of not

more than one thousand dollars, or to undergo an imprisonment for a period not exceeding six months, or both such fine and imprisonment, at the discretion of the court. Such fine, when collected, to go to the county school fund of such county in which such well may be located. (L. 1905, p. 310.)

§ 4852. Time in which to comply with this Act.

That any person, co-partnership or corporation in possession, either as owner, lessee, agent or manager of any well producing natural gas in order to prevent the said gas from wasting by escape, shall within ten days after this act takes effect and thereafter within ten days after penetrating the gas-bearing rock in any well drilled, shut in and confine the gas in said well until and during such time as the gas therein shall be utilized for light, or fuel, or steam power: *Provided*, that this section shall not apply to any well that is operated for oil, when the production of oil has a greater available market value than the production of gas therefrom, or during the process of drilling with reasonable diligence, or when oil is found in a lower strata of sand the well is operated as an oil well and the gas from the upper strata of said well is cased off. (L. 1905, p. 311.)

§ 4853. Storm burners.

That it shall be unlawful for any person, co-partnership or corporation to use natural gas for illuminating purposes other than in what is known as storm burners, or other burners consuming more gas than such storm burners, and any one using such gas in the open air, or in or around derricks, shall turn off said gas not later than eight o'clock in the morning of each day such lights are burning or used, and shall not turn on or relight the same between the hours of eight o'clock a. m., and five o'clock p. m. (L. 1905, p. 311.)

§ 4854. Accidents.

After the lapse of the period of ten days, unavoidable accidents excepted, from the bringing in of any oil or gas well, each and every day that said well or wells are allowed to go uncontrolled or uncared for, as directed by this statute, shall be treated as a separate offense. (L. 1905, p. 311.)

§ 4855. Penalty for violation.

Any owner or operator or person who shall violate any of the provisions of sections 5 or 6 of this Act (4852 and 4853), shall be guilty of a misdemeanor, and shall be fined in a sum not exceeding five thousand dollars for each and every offense, which fine, when collected, shall be paid to the school fund of the county in which the well is situated. (L. 1905, p. 312.)

ARTICLE V.

OWNERSHIP OF NATURAL GAS.—OUTPUT RESTRICTED.

§ 1. Ownership defined.
§ 2. Right of owner, restrictions on output.
§ 3. Purchaser of output.—Prices and amounts of gas to be taken.
§ 4. Taking more than share of gas in damages and penalties.
§ 5. Violations of act.—Punishment.

Senate Bill 130.

AN ACT defining ownership of natural gas, providing for the taking of same and making it larceny to take natural gas except as herein provided.

[Acts 1913, p. 439.]

Be it enacted by the people of the state of Oklahoma:

§ 1. Ownership defined.

Section 1. All natural gas under the surface of any land in this State is hereby declared to be and is the property of the owners, or gas lessee, of the surface under which gas is located in its original state.

§ 2. Rights of owners.—Restrictions on output.

Sec. 2. Any owner, or oil and gas lessee, of the surface having the right to drill for gas shall have the right to sink a well to the natural gas underneath the same and to take gas therefrom until the gas under such surface is exhausted. In case other parties, having the right to drill into the common reservoir of gas, drill a well or wells into the same, then the amount

of gas each owner may take therefrom shall be proportionate to the natural flow of his well or wells to the natural flow of the well or wells of such other owners of the same common source of supply of gas, such natural flow to be determined by any standard measurement at the beginning of each calendar month; provided, that not more than twenty-five per cent of the natural flow of any well shall be taken, unless for good cause shown, and upon notice and hearing the corporation commission may, by proper order, permit the taking of a greater amount. The drilling of a gas well or wells by any owners or lessee of the surface shall be regarded as reducing the possession his share of such gas as is shown by his well.

§ 3. Purchasers of output.—Prices and amounts of gas to be taken.

Sec. 3. Any person, firm or corporation taking gas from a gas field, except for purposes of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the corporation commission after notice and hearing; provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlying such gas.

§ 4. Taking more than share of gas.—Damages and penalties.

Sec. 4. Any person, firm or corporation taking more than his or its proportionate share of such gas, in violation of the provisions of this Act, shall be liable to any adjoining well owner for all damages sustained thereby and subject to a penalty for each violation not to exceed five hundred dollars ($500), and each day such violation is continued shall be a separate offense.

§ 5. Violations of act.—Punishment.

Sec. 5. Any person or agent of a corporation who takes gas, or aids or abets in the taking gas, except as herein provided,

either directly or indirectly, as an individual, officer, agent or employee of any corporation thereof, shall be sentenced to the penitentiary not to exceed five (5) years.

Approved May 16, 1913.

ARTICLE VI.

NATURAL GAS.—WASTE.

§ 1. Waste prohibited.
§ 2. Waste defined.
§ 3. Conservation of gas.
§ 4. Excess gas supply.—Apportionment.
§ 5. "Common purchaser."—Fair treatment.
§ 6. Hearing before corporation commission.
§ 7. Appeals to supreme court.
§ 8. Power of corporation commission.—Rules and regulations.
§ 9. Acceptance by pipe lines.
§ 10. Duties of mine inspector unchanged.
§ 11. Validity of several sections of act independent.
§ 12. Penalties for violation.
§ 13. Emergency.

(House Bill No. 395.)

AN ACT to conserve natural gas in the state of Oklahoma, to prevent same, thereof, providing for the equitable taking and purchase of same, conferring authority on the corporation commission, prescribing a penalty for violation of this act, repealing certain acts, and declaring an emergency.

[Acts 1915, p. 326.]

Be it enacted by the people of the state of Oklahoma:

§ 1. Waste prohibited.

Section 1. That the production of natural gas in the State of Oklahoma, in such manner, and under such conditions as to constitute waste, shall be unlawful.

§ 2. Waste defined.

Sec. 2. That the term waste, as used herein in addition to its ordinary meaning, shall include escape of natural gas in commercial quantities into the open air, the international drown-

ing with water of a gas stratum capable of producing gas in commercial quantities, underground waste, the permitting of any natural gas well to wastefully burn and the wasteful utilization of such gas.

§ 3. Conservation of gas.

Sec. 3. That whenever natural gas in commercial quantities or a gas bearing stratum, known to contain natural gas in such quantity, is encountered in any well drilled for oil or gas in this State, such gas shall be confined to its original stratum until such time as the same can be produced and utilized without waste, and all such strata shall be adequately protected from infiltrating water. Any unrestricted flow of natural gas in excess of two million cubic feet per twenty-four hours shall be considered a commercial quantity thereof; provided, that if in the opinion of the corporation commission, gas of a lesser quantity shall be of commercial value, said commission shall have authority to require the conservation of said gas in accordance with the provisions of this Act; and provided, further, the gauge of the capacity of any gas well shall not be taken until such well has been allowed an open flow for the period of three days.

§ 4. Excess gas supply.—Apportionment.

Sec. 4. That whenever the full production from any common source of supply of natural gas in this State is in excess of the market demands, then any person, firm or corporation having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the corporation commission may by proper order permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said

commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the State, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another.

§ 5. "Common purchaser."—Fair treatment.

Sec. 5. That every person, firm or corporation, now or hereafter engaged in the business of purchasing and selling natural gas in this State, shall be a common purchaser thereof, and shall purchase all of the natural gas which may be offered for sale, and which may reasonably be reached by its trunk lines or gathering lines without discrimination in favor of one producer as against another save as authorized by the corporation commission after due notice and hearing; but if any such person, firm or corporation shall be unable to purchase all the gas so offered, then it shall purchase natural gas from each producer ratably. It shall be unlawful for any such common purchaser to discriminate between like grades and pressures of natural gas, or in favor of its own production, in which it may be directly or indirectly interested either in whole or in part, but for the purpose of prorating the natural gas to be marketed, such production shall be treated in like manner as that of any other producer or person, and shall be taken only in the ratable proportion that such productions bears to the total production available for marketing. The corporation commission shall have authority to make regulations for the delivery, metering and equitable purchasing and taking of all such gas and shall have authority to relieve any such common purchaser, after due notice and hearing from the duty of purchasing gas of an inferior quality or grade.

§ 6. Hearing before corporation commission.

Sec. 6. That any person, firm or corporation, or the Attorney General on behalf of the State may institute proceedings before

the corporation commission, or apply for a hearing before said commission, upon any question relating to the enforcement of this Act; and jurisdiction is hereby conferred upon said commission to hear and determine the same, said commission shall set a time and place when such hearing shall be had and give reasonable notice thereof to all persons or classes interested therein, by publication in some newspaper or newspaper having general circulation in the State, and shall in addition thereto cause notice to be served in writing upon any person, firm or corporation, complained against in the manner now provided by law for serving summons in civil actions. In the exercise and enforcement of such jurisdiction and commission is authorized to summon witnesses, make ancillary orders, and use such means and final process, including inspection and punishment as for contempt, analogous to proceedings under its control over public service corporations as now provided by law.

§ 7. Appeals to Supreme Court.

Sec. 7. That appellate jurisdiction is hereby conferred upon the Supreme Court of this State to review the orders of said commission made under this Act. Such appeal may be taken by any person, firm or corporation, shown by the record to be interested therein, in the same manner and time as appeals are allowed by laws from other orders of the corporation commission. Said orders so appealed from may be superseded by the commission or by the Supreme Court such terms and conditions as may be just and equitable.

§ 8. Power of corporation commission.—Rules and regulations.

Sec. 8. That the corporation commission shall have authority to make regulations for the prevention of waste of natural gas, and for the protection of all natural gas, fresh water, and oil bearing strata encountered in any well drilled for oil or natural gas, and to make such other rules and regulations, and to employ or appoint such agents with the consent of the Governor as may be necessary to enforce this Act.

§ 9. Acceptance by pipe lines.

Sec. 9. Before any person, firm or corporation shall have, possess, enjoy or exercise the right of eminent domain, right of way, or equipments belonging thereto or used in connection therewith, for the carrying or transportation of natural gas, whether for hire or otherwise, or shall have the right to engage in the business or purchasing, piping or transporting natural gas as a public service or otherwise, such person, firm or corporation shall file in the office of the corporation commission a proper and explicit authorized acceptance of the provisions of this Act.

§ 10. Duties of Mine Inspector unchanged.

Sec. 10. That nothing contained in this Act shall be construed to interfere with any duties now imposed by law upon the Chief Mine Inspector of the State or his deputies.

§ 11. Validity of several sections of Act independent.

Sec. 11. That the invalidity of any section, subdivision, clause or sentence of this Act shall not in any manner affect the validity of the remaining portion thereof.

§ 12. Penalties for violation.

Sec. 12. That in addition to any penalty that may be imposed by the corporation commission for contempt, any person, firm or corporation, or any officer, agent or employee thereof, directly or indirectly violating the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction thereof, in a court of competent jurisdiction, shall be punished by a fine in any sum not to exceed five thousand dollars ($5,000), or by imprisonment in the county jail, not to exceed thirty (30) days, or by both such fine and imprisonment.

§ 13. Emergency.

Sec. 13. For the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this Act shall take effect and be in force from and after its passage and approval.

Approved March 30, 1915.

ARTICLE VII.

PRODUCTION AND SALE OF OIL.—POWERS OF CORPORATION COMMISSION.

§ 1. Waste prohibited.
§ 2. Production and sale regulated.—Corporation commission.
§ 3. Waste defined.—Production.
§ 4. Production regulated.—Discrimination of purchaser prohibited.
§ 5. Wells gauged.—Governor to consent.
§ 6. Enforcement of act.—Hearing before corporation commission.
§ 7. Appeals to supreme court.—Effect of orders.
§ 8. Penalty for violation.
§ 9. State may secure receivers.—Extent and money.
§ 10. Validity of relative sections of act.
§ 11. Emergency.

House Bill No. 168.

AN ACT defining and prohibiting the waste of crude oil or petroleum, providing for the equitable taking of the same from the ground and conferring authority on the corporation commission, prescribing and penalty for the violation of this act and declaring an emergency.

[Acts 1915, p. 28.]

Be it enacted by the people of the state of Oklahoma:

§ 1. Waste prohibited.

Section 1. That the production of crude oil or petroleum in the State of Oklahoma, in such manner and under such conditions as to constitute waste, is hereby prohibited.

§ 2. Production and sale regulated.—Corporation commission.

Sec. 2. That the taking of crude oil or petroleum from any oil-bearing sand or sands in the State of Oklahoma at a time when there is not a market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum is hereby prohibited, and the actual value of such crude oil or petroleum at any time shall be the average value as near as may be ascertained in the United States at retail of the by-products of such crude oil or petroleum when refined, less the cost and a reasonable profit in the business of transporting, re-

fining and marketing the same, and the corporation commission of this State is hereby invested with the authority and power to investigate and determine from time to time the actual value of such crude oil or petroleum by the standard herein provided, and when so determined said commission shall promulgate its findings by its orders duly made and recorded, and publish the same in some newspaper or general circulation in the State.

§ 3. Waste defined.—Protection.

Sec. 3. That the term "waste" as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demand. The corporation commission shall have authority to make rules and regulations for the prevention of such waste, and for the protection of all fresh water strata, and oil and gas bearing strata, encountered in any well drilled for oil.

§ 4. Production regulated.—Discrimination of Purchaser prohibited.

Sec. 4. That whenever the full production from any common source of supply of crude oil or petroleum in this State can only be obtained under conditions constituting waste, as herein defined, then any person, firm or corporation, having the right to drill into and produce oil from any such common source of supply, may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom, without waste, as the production of the well or wells of any such person, firm, corporation, bears to the total production of such common source of supply. The corporation commission is authorized to so regulate the taking of crude oil or petroleum from any or all such common sources of supply, within the State of Oklahoma, as to prevent the inequitable or unfair taking, from a common source of supply of such crude oil or petroleum, by any person, firm or corporation, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another.

§ 5. Wells gauged.—Governor to consent.

Sec. 5. That for the purpose of determining such production, a gauge of each well shall be taken under rules and regulations to be prescribed by the corporation commission, and said commission is authorized and directed to make and promulgate, by proper order such other rules and regulations, and to employ or appoint such agents with the consent of the Governor, as may be necessary to enforce this Act.

§ 6. Enforcement of Act—Hearing before corporation commission.

Sec. 6. That any person, firm or corporation, or the Attorney General, on behalf of the State, may institute proceedings before the corporation commission, or apply for a hearing before said commission, upon any question relating to the enforcement of this Act, and jurisdiction is hereby conferred upon said commission to hear and determine the same. Said commission shall set a time and place, when and where such hearing shall be had and give reasonable notice thereof to all persons or classes interested therein, by publication in some newspaper or newspapers, having general circulation in the State, and in addition thereto, shall cause reasonable notice in writing to be served personally on any person, firm or corporation complained against. In the exercise and enforcement of such jurisdiction, said commission is authorized to determine any question or fact, arising hereunder, and to summon witnesses, make ancillary orders, and use mesne and final process, including inspection and punishment as for contempt, analogous to proceedings under its control over public service corporations, as now provided by law.

§ 7. Appeals to Supreme Court.—Effect on orders.

Sec. 7. That appellate jurisdiction is hereby conferred upon the Supreme Court in this State to review the action of said commission in making any order, or orders, under this Act. Such appeal may be taken by any person, firm or corporation, shown by the record to be interested therein, in the same manner and time as appeals are allowed by law from other orders of the corporation commission. Said orders so appealed from shall not be superseded by the mere fact of such appeal being taken.

but shall be and remain in full force and effect until legally suspended or set aside by the Supreme Court.

§ 8. Penalty for violation.

Sec. 8. That in addition to any penalty that may be imposed by the corporation commission for contempt, any person, firm or corporation or any officer, agent or employee thereof, directly or indirectly violating the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction thereof, in a court of competent jurisdiction, shall be punished by a fine in any sum not to exceed five thousand dollars ($5,000), or by imprisonment in the county jail not to exceed thirty (30) days, or by both fine and imprisonment.

§ 9. State may secure receiver.—Extent and manner.

Sec. 9. That in addition to any penalty imposed under the preceding section, any person, firm or corporation violating the provisions of this Act, shall be subject to have his or its producing property placed in the hands of a receiver by a court of competent jurisdiction, at the suit of the State through the Attorney General or any county attorney, but such receivership shall only extend to the operating of producing wells and the marketing of the production thereof, under the provisions of this Act.

§ 10. Validity of relative sections of Act.

Sec. 10. That the invalidity of any section, subdivision, clause or sentence of this Act shall not in any manner affect the validity of the remaining portion thereof.

§ 11. Emergency.

Sec. 11. For the preservation of the public peace, health and safety, an emergency is hereby declared to exist by reason whereof this Act shall take effect and be in force from and after its passage and approval.

Approved February 11, 1915.

OIL AND GAS DEPARTMENT—CORPORATION COMMISSIONERS—CONSERVATION AGENT.

[Acts 1917, p. 385.]

[House Bill No. 136.]

AN ACT for the creation of an oil and gas department under the jurisdiction of the corporation commissioners to appoint a chief oil and gas conservation agent and conferring exclusive jurisdiction on the corporation commissioners in referencee to the conservation of oil and gas and the inspection of gasoline and oil, and the product of crude petroleum, and repealing all acts or parts of acts in conflict therewith, and declaring an emergency.

Be it enacted by the people of the State of Oklahoma:

§ 1. Oil and gas department established.

Section 1. The corporation commissioner is hereby empowered and authorized to create and establish an oil and gas department under the jurisdiction and supervision of the corporation commissioners, and is hereby authorized to appoint with the approval and consent of the Governor, a chief oil and gas conservation agent, who shall have charge of the oil and gas department herein authorized.

§ 2. Corporation commissioners.—Jurisdiction.

Sec. 2. All authority and duties now conferred upon the corporation commissioners or other departments of the state government in reference to the conservation of oil and gas and the drilling and operating oil and gas wells and the construction and regulation of oil and gas pipe lines, are hereby conferred exclusively upon the corporation commissioner.

§ 3. Rules and regulations.—Plugging wells.

Sec. 3. The corporation commissioner is hereby authorized to prescribe rules and regulations for the plugging of all abandoned

oil and gas wells. The same shall be plugged under the direction and supervision of the conservation agents of the corporation commissioner as may be prescribed by the corporation commissioners. All orders and regulations in reference to plugging wells shall be made after general hearing as now prescribed by law for the promulgation of orders by the corporation commissioner.

§ 4. Oil and gas.—Inspection.

Sec. 4. Jurisdiction is hereby conferred upon the corporation commissioner to inspect all oils and liquids, the product of petroleum or other bituminous substances or into which the product of petroleum enters, by whatever name called, which may be or can be used for illuminating, heating or power purposes, manufactured in this state or brought into it, before the same are consumed, used, sold or offered to be sold or disposed of to merchants, consumers or other persons within this state, and the corporation commissioner is hereby authorized to appoint, with the approval of the Governor, oil inspectors who shall perform the duties now prescribed by chapter 96, Session Laws 1915, and to perform such other duties as may be required by general rules and regulations of the corporation commissioner.

§ 5. Fees of Inspector.

Sec. 5. The oil inspector hereby authorized shall receive the compensation now provided in chapter 96, Session Laws, 1915, for the inspection of oil and liquids.

§ 6. Acts in conflict repealed.

Sec. 6. All acts and parts of acts in conflict herewith are hereby repealed.

§ 7. Emergency.

Sec. 7. For the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in force from and after its passage and approval.

Approved this 16th day of February, 1917.

NOTE.—By Act of March 24, 1917 [Acts 1917, p. 387], a record has been published by the state of all abandoned oil and gas wells, and dry holes plugged under the supervision of the Chief Inspector of Mines, oil and gas, covering the period from June 30, 1912, to June 30, 1917.

SCHOOL LAND—OIL AND GAS.

[Senate Bill No. 181.]

AN ACT regulating the leasing of school and other public lands owned by the state for oil and gas purposes and declaring an emergency.

[Acts 1917, p. 462.]

Be it enacted by the people of the state of Oklahoma:

§ 1. Commissioners of the land office.—Lease.

Section 1. The commissioners of the land office are authorized to lease for oil and gas purposes any of the school or other lands owned by the state of Oklahoma which such commissioners may deem valuable for oil and gas, for the term of five years and as long thereafter as oil or gas may be produced therefrom in paying quantities, upon such terms and conditions and in such qualities as the commissioners shall by rules and regulations prescribe. Each such lease shall provide for the delivery to the state of a royalty of not less than one-eighth part of the oil or gas produced from the leased premises or in lieu thereof the payment to the state of the market value of said royalty interest as the commissioners may elect. Such leasing shall be made by public competition after not less than thirty days' notice by

publication in two newspapers authorized by law to publish legal notices, one of which newspapers shall be published at the State Capitol, and the other in the county where the land is situated. Such leasing shall be let by sealed bids and each lease awarded to the highest bidder. Such oil and gas leases may be assigned only with the consent and approval of the commissioners of the land office. *Provided,* That the commissioners have the right to reject any and all bids.

§ 2. Empowered to segregate.

Sec. 2. The commissioners are empowered to segregate any school or public lands for mineral purposes which the commissioners may, by order entered of record, determine to be valuable for oil, gas or mineral purposes, and each agricultural, grazing or other lease of the surface rights or interest in any land so segregated shall reserve to the state, the lessees or grantees the right to explore, drill and operate for oil or gas on such lands as well as the right to enter upon the said lands and enjoy the mining rights so reserved.

§ 3. Term of lease.

Sec. 3. All oil and gas leases executed by the commissioners of the land office shall be for a term of five years, and as long thereafter as oil or gas may be produced in paying quantities; *Provided,* Upon the forfeiture or cancellation or surrender or expiration of the lease by reason of its termination on account of the five years' limit, provided for in the "Enabling Act," or any other cause, the school land commissioners shall provide for the leasing of such land in the same way and in the same manner that the school land commissioners lease land which has never been leased. *Provided,* On such leases which are surrendered or which may expire or which have expired, the lessees or assignees shall have the value of the physical properties on such lease, which value shall be determined by a board of appraisers especially

appointed by the school land commissioners for the appraising of physical property of leases. *Provided,* no physical property valuation shall be attached or considered in the making of a lease on a tract consisting of more than 640 acres. If no well shall be completed upon any leased premises within one year from the date of the lease, the lessee shall pay to the state of Oklahoma an annual rental in advance of such sums per acre as the commissioners shall prescribe in the lease, which payment shall operate to defer the completion of a well during the year for which such rental payment is made.

§ 4. Provisions of lease.

Sec. 4. All leases for oil and gas shall contain a provision to drill one well on each leased tract within one year from the date of such lease, or on failure to complete such well to pay an annual rental per acre as hereinbefore provided. All such leases shall further provide that the lessee shall drill a sufficient number of wells upon the leased lands to offset all producing wells upon any adjoining or contiguous lands, and a further provision that the failure of the lessee to diligently and in good faith operate the leased premises for oil and gas to as full an extent as other lands are operated in the general oil and gas field where such leased lands is located shall forfeit all rights of the lessee under such lease. Each lessee shall execute a bond to the state of Oklahoma with sureties to the approval of the commissioners and in such sum as the commissioners may prescribe, conditioned for the faithful performance of the provisions of the lease and for the payment of all recoverable damages which such lessee may cause to the property, crops or rights of the surface lessee. Each lease shall further provide that in the event the state shall at any time operate a refinery for the refining of crude petroleum or the extraction of any of its products or by-products, the state shall have the preference right to purchase and take the production or output of any such oil or gas well at the prevailing market price thereof, upon the commissioners serving written notice upon the owners of any well of the purpose and readiness of the state to take such production.

§ 5. Rules governing leases.

Sec. 5. The commissioners of the land office may adopt and promulgate appropriate rules and regulations for carrying into effect the provisions of this act; but no restrictions or prohibitions against any bidder or prospective bidder shall be made other than as provided in this act.

§ 6. Lessee.—Liable.—Surface.—Owners.

Sec. 6. The lessee under any oil or gas lease executed by the commissioners of the land office shall be liable to the surface owner or lessee for all injury, damage or loss occurring to the surface interest, interest in such lands or to any building, crops or improvements or other property located upon or used in connection with said land.

§ 7. Funds.—Bonuses.—Royalties.

Sec. 7. All funds arising from bonuses, royalties or rentals for oil and gas leases shall be carried into and credited to the permanent funds for the purpose designated in the grant of such lands by congress to the state of Oklahoma, and all such funds shall be kept, handled and used in like manner as other moneys belonging to said permanent funds.

§ 8. Acts in conflict repealed.

Sec. 8. All acts or parts of acts inconsistent herewith are hereby repealed.

§ 9. Emergency.

Sec. 9. For the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in force from and after its passage and approval.

Approved this 30th day of March, 1917.

NATURAL GAS.—DOMESTIC CORPORATIONS MAY PURCHASE FROM FOREIGN CORPORATIONS.

§ 1. Gas from interstate pipe lines.—License from corporation commission.
§ 2. Foreign and domestic corporations to have a separate ownership.

AN ACT permitting gas pipe line corporation and all municipal corporations to contract with and purchase from foreign corporations or interstate pipe line companies, the supply of gas for their lines; and permitting the selling of natural gas for said purposes by interstate pipe line companies.

[Acts 1913, p. 165.]

Be it enacted by the peoples of the State of Oklahoma:

§ 1. Gas from interstate pipe lines.—License from corporation commission.

Section 1. All domestic gas pipe line corporations in this State which are now, or shall hereafter fully comply with the laws of this State, and all municipal corporations, owning or operating a gas plant, or which may hereafter own or operate a gas plant, may contract with and secure from foreign corporations, operating interstate gas pipe lines, the supply of gas for said domestic gas companies. And said interstate gas pipe line companies or foreign corporation may enter into said contract and deliver said gas, upon obtaining a license from the corporation commission, which is hereby authorized to grant a license to do and transact that particular business of supplying domestic corporations with natural gas, and the taking out of said license and the conduct of said business with domestic pipe line companies, shall not prejudice the said interstate pipe line companies, or foreign corporations in the transaction and conducting of their interstate business; provided, the corporation commission may revoke said license when, in its discretion, the public interest may be best subserved thereby.

§ 2. Foreign and domestic corporations to have a separate ownership.

Sec. 2. No person or corporation, interested or doing business as an interstate gas pipe line company, shall be interested in or own or control any of the stock of a domestic corporation, purchasing gas from an interstate pipe line company.

Approved March 26, 1913.

ARTICLE VIII.

REGULATION OF PRODUCTION AND TRANSPORTATION OF NATURAL GAS.

§ 1. Business and persons subject to the act.—Vested rights excepted.
§ 2. Pipe line right of way.—Eminent domain.—Highways.
§ 3. Pipe line operators common purchasers.—Requirements.—Exemptions.
§ 4. Pipe line operators to be common carriers.—Obligations.—Exemptions.
§ 5. Non-compliance with act made unlawful.—Effect.
§ 6. Prerequisite to carrying gas.—Records for corporation commission.
§ 7. Right of way.—Highways.—Eminent domain.
§ 8. Filing records with corporation commission.—Extension of time.
§ 9. Only 25 percent of capacity of wells to be taken.
§ 10. Meter requirements.
§ 11. Violation of act, punishment.
§ 12. Violations.—Receivership.—Procedure.
§ 13. Evidence, reports of gas companies.
§ 14. Enforcement by corporation commission.—Appeals.
§ 15. Extension of time for operation of act.
§ 16. Emergency.

House Bill No. 723.

AN ACT to regulate corporation associations, and persons engaged in this state, in the business of carrying natural gas through pipe lines; to regulate operators of gas wells, regulating the purchase of natural gas by pipe lines, providing for violations thereof, conferring jurisdiction in the corporation commission for enforcement of the provisions of this act, and declaring an emergency.

[Acts 1913, chap. 99.]

Be it enacted by the people of the state of Oklahoma:

§ 1. Business and persons subject to the Act.—Vested rights excepted.

Section 1. Every corporation, joint stock company, limited co-partnership, partnership or other person, now or hereafter exercising or claiming the right to carry or transport natural gas by or through pipe line or lines for hire, compensation or otherwise, or now or hereafter exercising or claiming the right to engage in the business of producing, piping or transporting natural gas, or any other person or persons, now or hereafter

engaging in the business of buying, selling or transporting natural gas within the limits of this State, shall not have or possess the right to conduct or engage in said business or operations, in whole or in part as above described, or have or possess the right to locate, maintain or operate the necessary pipe lines, fixtures and equipment thereto belonging, or use in connection therewith, concerning the said business of carrying or transporting natural gas as aforesaid on, over, along, across, through, in or under any present or future highway, or part thereof, within the State, or to have or possess the right of eminent domain, or any other right or rights concerning said business or operation, in whole or in part, except as authorized by and subject to the provisions of this Act, except further and only such right or rights as may already exist which are valid, vested and incapable of revocation by the law of this State or of the United States.

§ 2. Pipe line right of way.—Eminent domain.—Highways.

Sec. 2. For the purpose of acquiring necessary right of way, every such person is hereby granted the right of condemnation by eminent domain, and in the use of the highways in this State, for the purpose of transporting natural gas by pipe lines, and the location, laying, constructing, maintaining and operations thereof.

§ 3. Pipe line operators common purchasers.—Requirements. —Exemptions.

Sec. 3. Every corporation, joint stock company, limited copartnership, partnership or other person, now or hereafter claiming or exercising the right to carry or transport natural gas by pipe or pipe lines, for hire, compensation or otherwise, within the limits of this State, is allowed by, and upon compliance with the requirements of this Act, as owner, lessee, licensee, or by virtue of any other right or claim, which is now engaged or hereafter shall engage in the business of purchasing natural gas, shall be a common purchaser thereof, and shall purchase all the natural gas in the vicinity of, or which may be reasonably reached by its pipe lines, or gathering branches, without dis-

crimination in favor of one producer or one person as against another, and shall fully perform all the duties of a common purchaser; but if it shall be unable to perform the same, or be legally excused from purchasing and transporting all the natural gas produced or offered, then it shall purchase and transport natural gas from each person or producer ratably, in proportion to the average production, and such common purchasers are hereby expressly prohibited from discriminating in price or amount for like grades of natural gas or facilities as between producers or person; and in the event it is likewise a producer, it is hereby prohibited from discrimination in favor of its own production, or production in which it may be interested directly or indirectly in whole or in part, and its own production shall be treated as that of any other person or producer. All persons, firms, associations and corporations are exempted from the provisions of this Act, except from the provisions of section nine (9) hereof, where the nature and extent of their business is such that the public needs no use in the same, and the conduct of the same is not a matter of public consequence, and for this purpose the district courts of the State and the corporation commission are hereby vested with jurisdiction to determine such exemptions in any action or proceeding properly before them, and provided by the laws now in force in this State regulating the purchase and transportation of oil.

§ 4. Pipe line operators to be common carriers.—Obligations.—Exemptions.

Sec. 4. Every corporation, joint stock company, limited copartnership, or other person, now or hereafter engaged in the business of carrying or transporting natural gas for hire, for compensation or otherwise by pipe line or pipe lines, within this State, and by virtue of and in conformity to, any valid law incapable of revocation by any law of this State or of the United States, or by virtue of and in conformity to the provisions of this Act, shall be a common carrier thereof as at common law, and no such common carrier shall allow or be guilty of any unjust or any unlawful discrimination, directly or indirectly, in favor of the carriage, transportation or delivery of any natural gas, offered to it, in its possession or control or

in which it may be interested, directly or indirectly; provided, that any municipality now owning or operating a gas pipe line for the purpose of furnishing gas for said municipality and now under contract with any person, firm or corporation to furnish it gas, shall be exempted from the provisions of this section during the life of said contract, or until changed or abrogated by the parties thereto. And, provided, further, that any person, firm or corporation owning or operating a gas pipe line within the limits of any incorporated city or town in this State shall be exempted from the provisions of this section only as to its distributing lines located wholly within the corporate limits of said city or town.

§ 5. Non-compliance with Act made unlawful.—Effect.

Sec. 5. It shall be unlawful for any corporation, joint stock company, limited co-partnership, partnership or other person, now or hereafter engaged in the business of carrying or transporting natural gas for hire or compensation or otherwise, within the limits of this Act and not becoming a common purchaser as defined by, and accepting the provisions of this Act, to own or operate, directly or indirectly, any gas well or wells, gas leases, or gas holdings or interests in this State, after six months next after the approval of this Act, and each and every said corporation, joint stock company, limited co-partnership, partnership or other persons shall divest themselves of all legal or equitable ownership, interest or control, directly or indirectly, in gas well or wells, gas leases or gas holdings or interest in this State.

§ 6. Prerequisite to carrying gas.—Records for corporation commission.

Sec. 6. Before any corporation, joint stock company, limited co-partnership, partnership or other persons shall have, possess, enjoy or exercise the right of eminent domain, right of way, right to locate, maintain or operate pipe lines, fixtures or equipment thereunto belonging, or used in connection therewith, as authorized by the provisions of this Act, or shall have, possess, enjoy or exercise any right (the word "right" in this connec-

tion being used in its most comprehensive legal sense) conferred by this Act, every such corporation, joint stock company, limited co-partnership, partnership or other person shall file in the office of said corporation commission proper and explicit authorized acceptance of the provisions of this Act and the Constitution of this State, in cases of pipe lines a plat showing in detail the points within this State between which, and the route along which the trunk lines are proposed to be constructed, the intended size and capacity thereof, and the location and capacity of all pumping stations, gate valves, check valves and connection and appliances of all kinds used, or to be used, on said trunk or lines; and upon demand of the corporation commission the proper party or parties, as required by said commission, shall properly file a plat showing in detail all the lines owned and operated by them respectively with full and explicit information as to their capacity, size and location, and the capacity of their pumping stations, gate valves, check valves and connections of all kinds respectively, or used in the operation thereof.

§ 7. Right of way.—Highways.—Eminent domain.

Sec. 7. Every domestic line company in this State is hereby given authority to build, construct, lay and maintain gas pipe lines over, under, across or through all highways, bridges, streets or alleys in this State or any public place under the supervision of the corporation commission as to where and how in said highways, bridges, streets, alleys and public places said pipe lines shall be laid; provided, the right to lay gas pipe lines in cities shall be acquired as now provided by law and subject to the responsibility as otherwise provided by law for any negligent injury thereby caused. All persons, natural or artificial, except foreign corporations, shall have the right of eminent domain, and any right or privilege hereby conferred, when necessary to make effective the purposes of this Act and the rights thereby conferred. Foreign corporations organized under the law of any other State or Territory, or the United States, and doing or proposing to do business in this State, and which shall have become a body corporate pursuant to or in accordance with the laws of this State and which, as hereby provided, shall have registered its acceptance of the terms hereof, shall receive all the benefits by this Act provided.

§ 8. Filing records with corporation commission.—Extension of time.

Sec. 8. Upon a sworn statement of the necessities which would justify a judicial continuance, the corporation commission is authorized to extend the time for the filing of the said plats, not, however, to exceed sixty days.

§ 9. Only twenty-five per cent of capacity of gas wells to be taken.

Sec. 9. Every corporation, joint stock company, limited co-partnership, partnership or other person, now or hereafter claiming or exercising the right to produce natural gas, or to carry or to transport natural gas through pipe line or pipe lines for hire, compensation, or otherwise within the limits of this State, is allowed by, and upon compliance with the requirements of this Act, as owner, lessee, licensee, or by virtue of any other right or claim, is hereby prohibited from taking more than twenty-five (25) per cent of the daily natural flow of any gas well or wells unless for good cause shown, under the exigencies of the particular case the corporation commission shall establish a different per centum under the prescribed rules and regulations therefor.

§ 10. Meters.—Requirements.

Sec. 10. No corporation, joint stock company, limited co-partnership, partnership or person doing business under the provisions of this Act shall purchase, collect transport, convey or sell any gas from any wells in this State except such gas as is run through properly constructed meters, the daily readings of which shall be carefully and accurately taken every twenty-four (24) hours, and of which a true and correct report under oath shall be made every month and which report of all such business transacted during the next preceding month shall be filed not later than the fifteenth (15th) day of each month with the corporation commission, and which report shall at all times be open to the inspection of the public. Such report shall be based upon daily meter reading; shall show the amount of gas run or purchased from each tract of lands, lease or lease-

hold estate, the names of the seller or sellers of such gas and of the purchaser or purchasers thereof; and any person or persons making or directing, counseling, advising, aiding or abetting in the making or filing of any false report in the premises shall be deemed guilty of perjury, and on conviction thereof be punished as provided by law; and to the end that such meters shall be properly constructed, maintained, repaired and operated, their installation, use and operation shall at all times be subject to such rules and regulations as the corporation commission may prescribe.

§ 11. Violation of Act.—Punishment.

Sec. 11. Any person, co-partnership or corporation, its agent or employees, violating any of the provisions of this Act, or any order of a court of competent jurisdiction of this State, or the corporation commission, pursuant to the jurisdiction conferred by this Act, shall upon conviction thereof be fined a sum of not less than one thousand dollars ($1,000), nor more than five thousand dollars ($5,000), or imprisonment not less than six months, nor more than one year, or by both such fine and imprisonment for each and every violation of this Act; but in case the monthly runs or takings or transportation of gas shall average so as to be without discrimination, as herein provided, a transaction or transactions of any particular day or week or portion of a month shall be disregarded; and the court of competent jurisdiction of the county in which the omission or commission, which is in violation of this Act, has occurred, shall have jurisdiction of an action under the Penal Code for the punishment thereof, and that said penalties shall not be exclusive of civil liability.

§ 12. Violations.—Receivership.—Procedure.

Sec. 12. The corporation commission shall, upon being reasonably satisfied that any corporation has violated the provisions of this Act, recommend to the Attorney General, he shall within ten days file a petition on behalf of the State in any court of competent jurisdiction, praying that a receiver be appointed, and such court shall immediately consider the application and appoint a receiver, if in the judgment of the court the provisions

of this Act have been wilfully violated. The receiver, when appointed, shall immediately take charge of all the business, property and assets of such corporation in the State and shall retain possession thereof until it shall be determined upon the trial whether or not such corporation has violated the provisions of this Act, then, in addition to the other penalties herein provided, all the property of said corporation shall be retained under such receivership until the penalties incurred hereunder are paid, after which the receivership may be discharged upon such terms and conditions as the court may impose as an assurance for the further compliance with this Act.

§ 13. Evidence.—Reports of gas companies.

Sec. 13. A properly certified transcript of the report of any such corporation, association or person shall, as against the makers thereof, be prima facie evidence of the truth of any matter therein contained.

§ 14. Enforcement by corporation commission.—Appeals.

Sec. 14. The corporation commission is hereby authorized and empowered to enforce all the provisions of this Act, including the employment of requisite help and gas experts to carry out the same, except where jurisdiction is conferred on some other branch of the State government by the Constitution of this State; appeals may be allowed from the decision of the commission to the Supreme Court as now provided by law for appeals in other cases.

§ 15. Extension of time for operation of Act.

Sec. 15. For good cause shown, the corporation commission is authorized to extend the time within which this Act shall operate as to any particular corporation, association or person not to exceed nine months after the same became effective.

§ 16. Emergency.

Sec. 16. For the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason

whereof this Act shall be in force and effect from and after its passage and approval.

Approved March 26, 1913.

ARTICLE IX.

METER REGULATIONS.

§ 1. Gas companies to use meters.
§ 2. Violations of act.—Punishment.
§ 3. Emergency.

AN ACT requiring corporation or persons furnishing natural gas to consumers in municipalities where the population exceeds five hundred to do so through standard meter rate and fixing a penalty for violation thereof and declaring an emergency.

[Acts 1913, p. 309.]

Be it enacted by the people of the state of Oklahoma:

§ 1. Gas companies to use meters.

Section 1. That all persons, firms, corporations or other business organizations engaged in the business of furnishing natural gas in municipalities in this State, to the inhabitants thereof, shall do so through standard meters at meter rates; provided, that this Act shall only apply to towns where population exceeds five hundred, and shall not prohibit the sale of gas at a flat rate of Federal, State or municipally owned buildings, institutions or plants; provided, further, that this Act shall not abrogate any existing contract or affect or change the terms or conditions of any franchise granted by any municipal corporation prior to and in effect April 28, 1913. (As amended April 2, 1915. Acts 1915, p. 309.)

§ 2. Violations of Act.—Punishment.

Sec. 2. Any person, firm, corporation or other business organization who shall violate any of the provisions of this Act shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than five dollars nor more than twenty-five dollars, and each day of such violation shall be deemed a separate offense.

§ 3. Emergency.

Sec. 3. An emergency is hereby declared, by reason whereof it is necessary for the immediate preservation of the public health and safety that this Act take effect and be in force from and after its passage and approval.

Approved April 28, 1913.

ONTARIO (CANADA).

PLUGGING GAS AND OIL WELLS.

§ 1. Natural gas not to be allowed to escape from unused wells.
§ 2. Inspector to notify owners to confine gas, and upon default, himself shall confine it.
§ 3. Plugging abandoned wells.
§ 4. Plug to be inserted in well.
§ 5. Inspector, upon complaint, to examine abandoned well and plug it.
§ 6. How expenses to be recovered by inspector.
§ 7. Penalty for violation of this Act.
§ 8. Inspectors to be appointed.
§ 9. Duties of inspectors.
§ 10. Inspectors may make regulations with consent of minister.
§ 11. Declaration to be made by certain persons respecting such wells.
§ 12. Repealing section.
§ 13. Inspector of pipe lines.—Notice.—Cost.
§ 14. Repairing pipe lines compelled.—Notice.
§ 15. Entry on land to inspect pipe lines.

AN ACT to prevent the wasting of natural gas and to provide for the plugging of all abandoned wells.

Assented to, 20th April, 1907.

[Statutes, 1907, p. 331.]

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

§ 1. Natural gas not to be allowed to escape from unused wells.

1. Any person in possession, whether as owner, lessee, agent or manager of any well in which natural gas has been found, shall, unless such gas is utilized within two weeks from the com-

pletion of such well, in order to prevent such gas from wasting by escape, confine the same in such well until such time as said gas is utilized; but this section shall not apply to any well while it is being operated as an oil well.

§ 2. Inspector to notify owners, etc., to confine gas, and upon default shall himself confine same.

2. Whenever the owner or any person in possession of or having the control of any well in which gas has been found, fails to comply with the provisions of section 1 hereof within the time therein mentioned, the inspector appointed, as hereinafter provided, shall notify such person in writing to cause such gas to be so confined, and in case of the failure of such person to comply with such notice within ten days from the receipt thereof the inspector shall enter upon the lands upon which such well is situate and either by himself, his agents or employees shall cause such gas to be shut in and confined in such well.

§ 3. Plugging abandoned wells.

3. Whenever any well which has been drilled for the purpose of exploring for oil or gas is afterwards abandoned it shall be the duty of the owner or the person in possession or control of such well, and of every person engaged or employed in removing the casing from or in plugging such well, and every person engaged or employed in removing the casing from or in plugging such well, or in any work constituting an abandonment of such well, to plug or plug and cement said well in such manner as to prevent any fresh or salt water or other injurious substance from entering the oil or gas-bearing rock either from above or below such rock.

(2) Subject to section 1, every well which, in the opinion of the inspector appointed under section 8 is not in operation shall be deemed to be an abandoned well within the meaning of this Act.

(3) The owner or person in possession or control of any well may, within ten days after receiving notice from the inspector that in his opinion the well is abandoned, appeal to the

Mine Assessor appointed under the Supplementary Revenue Act, 1907.

(4) The owner or other person appealing shall give to the inspector notice in writing of the appeal.

(5) The decision of the Mine Assessor shall be final and shall not be subject to appeal. (As amended May 6, 1913. Acts 1913, p. 943.)

§ 4. Plug to be inserted in well.

4. In every such case of abandonment, in addition to any other work necessary to the proper plugging of such well in compliance with the provisions of the next preceding section or of any regulations made by an inspector in the manner hereinafter provided, there shall be inserted in such well a round and slightly tapering plug of seasoned wood, not less than three feet in length and of such diameter as to enable it to be firmly driven and to fit tightly at the point where the casing was made to rest.

§ 5. Inspector upon complaint to examine abandoned well and plug same.

5. Whenever any person notifies the inspector in writing that any property in which he is interested, situate in the vicinity of any such abandoned well, is injuriously affected by the failure to plug any such well as in the next preceding section provided, the inspector shall examine such abandoned well and ascertain whether it has been properly plugged according to the provisions of this Act, and in case the inspector determine that such well has not been properly plugged within the meaning of this Act he shall serve a notice on the owner thereof or upon any person having the control thereof, or upon any person who was engaged or employed in the work of removing the casing from, or in plugging such well, or in any work which constituted an abandonment of such well, or may serve such notice on all of said persons, which notice shall require such well to be plugged within ten days from the receipt of such notice, and shall specify the method and manner to be followed in the plugging thereof, and unless within said ten days such well is plugged according to the directions contained in said notice, the inspector either by himself, his

agents or employees shall plug or cause such well to be plugged properly, according to the provisions of this Act.

(2) Where the inspector is of opinion that the casing in any well, whether the well is abandoned or not, is admitting water to such an extent as to injure adjoining property, he may order the owner or person in possession or control to remove the pump or other obstruction therein, so as to enable him to test the well, and the inspector may order the owner or other person to stop the leak, if there be one, within the time named by the inspector.

(3) In case of default in compliance with such order within ten days after service of the same, the inspector may without further notice proceed to plug the well as provided in subsection 1.

(4) The expenses occasioned by or incidental to such examination and plugging may be recovered in the manner provided by section 6.

(5) The owner or person in possession or control of the well may before the expiry of the time fixed by the inspector appeal from the order to the Mine Assessor as provided in subsection 3 of section 3, and the decision of the Mine Assessor shall be final and shall not be subject to appeal. (As amended May 6, 1917. Acts 1913, p. 943.)

§ 6. How expenses to be recovered by inspector.

6. The expense incidental or occasioned by the examination and plugging of any abandoned well or by the confining or shutting in of the gas from any well by the inspector under the provisions of this Act shall be paid to the inspector within ten days after notice in writing of the completion of the work and the amount of such expenses shall have been given to the owner or other person having control of any such well, and upon failure to pay the same within such time the inspector shall give written notice of such failure to pay to the clerk of the municipality in which such well is situate and of the amount payable, and the council of such municipality shall thereupon pay to the inspector such expenses and the same shall be added to the taxes upon any property of the owner of such well, whether such well is situate upon such property or not, unless the mineral rights in the land upon which such

well is situate have been severed or reserved from such land in which case the said expenses shall be added to any taxes chargeable against the reserved rights in the land upon which such well is situate or against any other property of the owner of such reserved mineral rights, and such expenses shall be placed upon the collector's roll of the municipality and may be levied and collected in the same manner as other taxes are levied and collected.

§ 7. Penalty for violation of this Act.

7. Any person found guilty of a violation of sections 1, 3, 4 or 11 of this Act shall, upon summary conviction, incur a penalty of not less than $10, and not more than $100, in addition to any costs and expenses which he may be liable to pay under the provisions of section 6 of this Act; but this section shall not affect any right of action for damages for injuries arising out of any matter or thing for which this section provides a penalty.

§ 8. Inspectors to be appointed.

8. An inspector or inspectors may be appointed by the Lieutenant-Governor from time to time to enforce the provisions of this Act, and assigned to such district or districts as he may deem proper. Each inspector shall give such security as the Minister of Lands, Forests and Mines shall require for the performance of his duties and the payment over of all moneys received by him.

§ 9. Duties of inspectors.

9. It shall be the duty of every such inspector to see that the provisions of this Act are complied with, to keep a record of all work done, notices given, proceedings taken and moneys received or paid out by him under the provisions of this Act. He shall have authority to engage such agents or employees as he may deem necessary from time to time to carry out the requirements of this Act, and shall also be empowered from time to time and at all times by himself, his servants or employees to enter upon any lands or property upon which any wells are being or have been drilled, and to make such examinations, inspection and inquiries as may be necessary for

carrying into effect the provisions of this Act; and no action or other proceeding shall lie against any such inspector, his agents or employees for any matter or thing done by him or them under the provisions of this Act.

§ 10. Inspectors may make regulations with consent of Minister.

10. Whenever the conditions of any locality make it desirable in the opinion of the inspector, he may, subject to the sanction of the Minister of Lands, Forests and Mines, make special regulations respecting the manner of plugging abandoned wells in such locality in addition to or in substitution for the method directed to be followed in this Act. Such regulations may be made to apply to the whole or any portion of the district in which such inspector is assigned, and may be promulgated in such manner as the said Minister shall direct, but shall not go into effect until after the lapse of six weeks from the first publication thereof.

§ 11. Declaration to be made by certain persons respecting such wells.

11. The inspector may by notice in writing delivered to any person who had charge or control of the removal of casing or plugging or abandonment of any well, or who was engaged or employed in removing the casing from or in plugging any such well or in any work constituting an abandonment of such well, require such persons within ten days from the receipt of such notice to furnish a statutory declaration respecting such abandoned well to said inspector; and such person shall within said ten days furnish said declaration to the inspector, either by delivering the same into his hands or by mailing by registered post to his address; and such declaration shall identify such well and shall set out in detail the precise manner of and the material and tools used in plugging the same; and any person violating the provisions of this section without sufficient cause or excuse shall incur the penalty provided by section 7 of this Act.

§ 12. Repealing section.

12. Chapters 276 and 277 of the Revised Statutes of Ontario, 1897, and amending Acts are hereby repealed.

AN ACT to amend the Natural Gas and Oil Wells Act.

Assented to 27th April, 1916.

[Acts 1916, p. 299.]

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. The Natural Gas and Oil Wells Act is amended by adding thereto the following sections:

§ 13. Inspection of pipes.—Notice.—Cost.

12a. (1) The inspector may inspect any main, pipe or duct through which natural gas may be flowing, drawn or pumped or which is intended to be used for any such purpose, and may give notice in writing to the owner or person in control of the main, pipe or duct to remedy any defect found therein which permits or is likely to permit the escape of gas.

(2) If the owner or person in control neglects to remedy the defect within ten days after service of the notice, the inspector may, without further notice, proceed to make the necessary alterations or repairs.

(3) The expenses occasioned by or incidental to the inspection, and to such alterations or repairs, may be recovered in the manner provided by section 7 with respect to the expenses mentioned in that section, but on default in payment by the owner or person in control the same shall be payable by the corporation of the municipality in which the defect exists, and such corporation shall have the like recourse against the owner or person in control as is provided in section 7.

(4) The owner or person in possession or control may, before the expiry of the time fixed by the inspector, appeal from the

order of the inspector to the Mine Assessor in the manner provided by subsection 3 of section 4, and the decision of the Mine Assessor shall be final and shall not be subject to appeal.

§ 14. Repairing pipe lines compelled.—Notice.

12b. Where the inspector finds that a line of pipe conveying gas from one locality to another is constructed or laid down in such a manner, or is so out of repair or otherwise defective, as to permit or be likely to permit of the escape of gas in considerable quantities, he may give to the owner or person in control of the line of pipe notice in writing to make the alterations or repairs prescribed in the notice within a stated time, and upon default in compliance with the terms of the notice, the Lieutenant-Governor in Council, upon the recommendation of the Minister of Lands, Forests and Mines, may suspend or revoke and annul any charter of incorporation or other authority under which the business of conveying gas in the line of pipe is carried on.

§ 15. Entry on land to inspect pipe lines.

12c. For the purpose of sections 12a and 12b the inspector, his agents, servants or employees may at any time enter upon any land or other property through, into or in which any main, pipe or duct passes or is situate and may make such examination, inspection and inquiries, and do all such work and generally have and exercise all such powers, rights and privileges as in the case provided for by section 6.

PENNSYLVANIA.

OIL AND GAS WELLS.

[Purdon's Digest, 13th edition, 3342-3345.]

§ 1. Oil wells to be plugged.
§ 2. Penalty for omission.
§ 3. Powers of adjoining owners in case of neglect.
§ 4. How abandoned oil wells to be plugged.
§ 5. Penalty for neglect.
§ 6. Powers of adjoining owners.
§ 7. How abandoned gas wells are to be plugged.—Description of filling.
§ 8. Penalty.
§ 9. Owners of land adjacent may plug.
§10. Plugging abandoned wells.
§11. Penalty.
§12. Person injured may plug well and recover expense.
§13. Repealing clause.
§14. Liability of joint owners for labor and materials.
§15. Rights of joint owners paying *pro rata* share.
§16. Repealing clause.
§17. Wilful injury to oil and gas wells.—Penalty.

§ 1. Oil wells to be plugged.

All owners and operators of oil lands within this commonwealth shall in all practical manner plug their oil wells, at proper depth, with wood and sediment, in a manner sufficient to exclude all fresh water from oil-bearing rock, and to prevent the flow of oil and gas into fresh water. (Act May 16, 1878; P. L. 56, § 1.)

§ 2. Penalty for omission.

Any person found guilty of violating the provisions of this Act shall be fined in any sum not less than twenty nor more than one hundred dollars for each and every offense, which shall be paid, one-half to the informer and the other half to the school district in which the offense is committed; which shall be collected as fines of like manner are by law collected. (Act May 16, 1878; P. L. 56, § 2.)

§ 3. Powers of adjoining owners in case of neglect.

Whenever the owner of any well has abandoned the same or does not reside in the county in which it is situated, any

person owning property adjoining may enter in and take possession of any oil well, for the purpose of carrying out the provisions of the first section of this Act, where the owner has refused or neglected to plug said well, so as to shut off the fresh water, as provided in section first, at the expense of the owner. (Act May 26, 1878; P. L. 56, § 3.)

§ 4. How abandoned oil wells to be plugged.

Whenever any well shall have been put down for the purpose of exploring for and producing oil, upon abandoning or ceasing to operate the same, the owner or operator shall, for the purpose of excluding all fresh water from the oil-bearing rock, and before drawing the casing, fill up the well with sand or rock sediment to the depth of at least twenty feet above the third sand or oil-bearing rock, and drive a round, seasoned wooden plug at least two feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing, and immediately after the drawing of the casing, shall drive a round wooden plug into the well, at the point just below where the lower end of the casing shall have rested, which plug shall be at least three feet in length, tapering in form, and to be of the same diameter at the distance of eighteen inches from the smaller end, as the diameter of the well below the point at which it is to be driven; [and] after it has been properly driven, shall fill in on top of same with sand or rock sediment, to the depth of at least five feet. (Act June 10, 1881; P. L. 110, § 1.)

§ 5. Penalty for neglect.

Any person who shall violate the provisions of this Act shall be liable to a penalty of two hundred dollars, one-half to be for the use of the informer, and one-half to the use of school district in which such well may be situated, to be recovered as debts of like amount are by law recoverable. (Act June 10, 1881; P. L. 100, § 2.)

§ 6. Powers of adjoining owners.

Whenever any person or operator shall neglect or refuse to comply with the provisions of section 1 of this Act, the owner of, or operator upon any land adjoining that upon which such abandoned well may be, may enter, take posses-

sion of said abandoned well, and plug the same as provided by this Act, at the expense of the owner or operator whose duty it may be to plug the same. (Act June 10, 1881, § 3.)

§ 7. How abandoned gas wells are to be plugged.—Description of filling.

Whenever any well shall have been put down on lands of any person, or corporation, for the purpose of exploring for or producing gas, upon abandoning or ceasing to operate the same, the person, or corporation, drilling or owning the well, shall, before drawing the casing, fill up the well with sand, or rock sediment, to the depth of at least twenty feet above the gas-bearing rock, and drive a seasoned wooden plug, at least two feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing, and, immediately after the drawing of the casing, shall drive a round wooden plug into the well, at the point just below where the lower end of the casing shall have rested, which plug shall be at least three feet in length, tapering in form, and to be of the same diameter at the distance of eighteen inches from the small end of the diameter of the well below the point at which it is to be driven. After the plug has been properly driven, there shall be filled in on the top of the same, sand or rock sediment, to the depth of at least five feet. (Act June 23, 1885; P. L. 145, § 2.)

§ 8. Penalty.

Any person who shall violate the provisions of the preceding section, shall be liable to a penalty of two hundred dollars, to be recovered as debts of like amount are by law recoverable. (Act June 25, 1885; P. L. 145, § 3.)

§ 9. Owners of land adjacent may plug.

Whenever any person shall neglect, or refuse to comply with the provisions of this Act, with regard to plugging wells, any owner of lands adjacent, or in the neighborhood of such unplugged well, may enter and take possession of said abandoned well, and plug the same, as provided by this act, at the expense of the person, or company, whose duty it may have been to plug the same. (Act June 23, 1885; P. L. 145, § 4.)

§ 10. Plugging abandoned oil wells.

Upon the abandonment or ceasing to operate or use any well which shall have been drilled for oil or gas, it shall be the duty of the person or persons interested in such well, to plug the same so as to completely shut off and prevent the escape of all water therefrom which may be impregnated with salt or other substances which shall render such water unfit for use for domestic, steam-making or manufacturing purposes, and in such manner as to prevent water from any such well injuring or polluting any spring, water well or stream which is or may be used for the purpose aforesaid. (Act May 26, 1891; P. L. 122, § 1.)

§ 11. Penalty.

Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and shall be sentenced, upon conviction thereof to pay a fine of not more than one thousand dollars, or to undergo an imprisonment for a period not exceeding six months, or both, or either, at the discretion of the court. (Act May 26, 1891; P. L. 122, § 2.)

§ 12. Person injured may plug well and recover expense.

Whenever any person may be injured by neglect or refusal to comply with the first section of this Act, it shall be lawful for such person, after notice to the owner or lessee of the premises upon which such well is located, to enter upon and fill up and plug such well in the manner directed by the first section hereof, and thereupon to recover the expense thereof from the person or persons whose duty it was to plug and fill up said well, in like manner as debts of such amounts are recoverable. (Act May 26, 1891; P. L. 122, § 3.)

§ 13. Repealing clause.

All Acts and parts of Acts inconsistent herewith are hereby repealed. (Act May 26, 1891; P. L. 122, § 4.)

§ 14. Liability of joint owners for labor and material.

From and after the passage of this Act any person or persons performing labor of any kind whatever, or furnishing material

for, upon or about any drilling, pumping or producing oil or gas well shall have the right to bring suit in *assumpsit* against any joint owner, joint tenant or tenant in common holding an interest in and operating such drilling, pumping or producing oil or gas well, to recover from such joint owner, joint tenant, or tenant in common, the *pro rata* share due and owing by such joint owner, joint tenant, or tenant in common for any labor done, or materials furnished, in, upon or about such drilling, pumping or producing oil or gas well, and the interest of such joint owner, joint tenant, or tenant in common shall be subject to levy and sale upon any execution issued to enforce collection of any claim under this Act, after judgment obtained by due process of law. (Act May 6, 1891; P. L. 41, § 1.)

§ 15. Rights of joint owners paying pro rata share.

Any joint owner, joint tenant or tenant in common, paying the *pro rata* share of the necessary expenses of any drilling, producing or pumping oil or gas well for any other joint owner, joint tenant or tenant in common holding an interest in and operating such drilling, pumping or producing oil or gas well shall have or possess all the rights of action, as provided in the first section of this Act, to the same extent as is given hereby to the person or persons performing the said labor or furnishing such materials: *Provided*, That no joint owner, joint tenant or tenant in common shall be required by this Act to pay any share of the expense of operations commenced and carried on without his authority or consent. (Act May 6, 1891; P. L. 41, § 2.)

§ 16. Repealing clause.

All acts or parts of acts inconsistent with the provisions of this Act be and the same are hereby repealed. (Act May 6, 1891; P. L. 41, § 3.)

§ 17. Willful injury to oil and gas wells.—Penalty.

If any person shall willfully and maliciously injure any well sunk for the production of oil, or gas, or water, or any tank intended or used for the storage of oil, or gas, or water, or any line of pipe intended or used for the transportation of oil or

gas, or water, or any machinery connected with such wells, tanks or lines of pipes, he shall be guilty of a misdemeanor, and upon being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo imprisonment, not exceeding three years, or both, or either, at the discretion of the court. (Act June 23, 1885; P. L. 145, § 1.)

OIL MINING COMPANIES.

§1. Surviving cotenants and executors joining in application for charter.
§2. Consolidation of oil mining companies.
§3. Corporate name.
§4. Power of directors to consolidate.
§5. Oil mining companies dealing in stock and bonds of other companies.
§6. Dissolution of corporations for mining petroleum.

§ 1. Surviving co-tenants and executors joining in application for charter.

The provisions of an Act to enable joint tenants, tenants in common and adjoining owners of mineral lands in this commonwealth to develop the same, passed the 21st day of April, 1854, and the supplements thereto, be and the same are hereby extended to mining for carbon oils, manufacturing, refining and selling, or conveying the same to market. (Act May 1, 1861; P. L. 438, § 1.)

§ 2. Consolidation of oil mining companies.

The provisions of the Act, entitled "An Act relating to railroad companies," passed May 16th, Anno Domini 1861, and the supplement thereto, entitled "A further supplement to an Act, entitled 'An Act relating to railroad companies,' passed May 16th, Anno Domini 1861," which supplement was approved the 23d day of March Anno Domini 1865, be and the same are hereby extended to oil and other mining companies. (Act April 18, 1897; P. L. 90, § 2.)

§ 3. Corporate name.

Any two or more oil or other mining companies which shall, according to the provisions of said recited Acts, agree to merge or consolidate their rights and privileges granted to them under the laws of this commonwealth, are hereby author-

ized to assume such name as the board of directors selected by the joint action of the joint action of said companies may designate, and also to fix the amount of the capital stock of said company after the consolidation, and designate the time and places of meeting of the board of directors: *Provided,* That immediately after said consolidation shall have been effected, it shall be the duty of said company to certify to the secretary of the commonwealth the name of said company and the amount of its capital stock. (Act April 18, 1867; P. L. 90, § 2.)

§ 4. Power of directors to consolidate.

It shall be lawful for the president and directors, or majority thereof of any oil or other mining company, agreeing or desirous of accepting the provisions of this Act, to make such merger and consolidate in manner and form as hereinbefore provided. (Act April 18, 1897; P. L. 90, § 3.)

§ 5. Oil mining companies dealing in stock and bonds of other companies.

Corporations incorporated under the provisions of the Act, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved April 29th, Anno Domini 1874, for the purpose of mining for petroleum, may subscribe for, purchase, hold and dispose of stock and bonds of any other corporation incorporated under the said act for the same purpose, and may also subscribe for, purchase, hold and dispose of stocks and bonds of any corporation incorporated under the provisions of the act, entiled "An Act to provide for the incorporation and regulation of natural gas companies, approved the 29th day of May, Anno Domini 1885. And may also subscribe for, purchase, hold and dispose of stocks and bonds in any corporations of other States incorporated for similar purposes: *Provided,* That the amount of such stock held by any corporation, together with the amount of its capital stock, shall not exceed, in the aggregate, the amount to which the capital of such corporations is limited by the 39th section of the Act to which this is supplemental. (Act May 3, 1889; P. L. 76, § 1.)

§ 6. Dissolution of corporations for mining petroleum.

Whenever any corporation organized for the purpose of mining for petroleum or other products and marketing the same, and owning real estate in any county in this commonwealth, shall have been in existence for the period of thirty years or longer and for the period of ten years or more prior to the passage of this Act shall not have been engaged in the business of such mining, nor have earned and distributed to the shareholders thereof any dividends out of its net earnings, it shall be the duty of the courts of common pleas of any county in which such real estate may be situated, upon the petition of the owner or owners of not less than one-third of the capital stock of any such corporation and after personal notice to other known stockholders resident within the county, and notice, to all others interested, by advertisement, in at least one newspaper of general circulation published within the county, for not less than two months, if the facts in the petition be not denied, or, if denied, shall be found by the court to be true, to order and decree a dissolution of such corporation, and to order and direct the sale of the real estate thereof by a trustee to be appointed for that purpose, and to decree distribution of the proceeds of such sales to and among the creditors or shareholders entitled thereto, in the same manner that the real estate of other dissolved corporations is now sold and the proceeds thereof distributed under the discretion of said courts. (Act March 27, 1903; P. L. 79, § 1.)

PETROLEUM.

STORAGE AND TRANSPORTATION.

[Purdon's Digest, 13th edition, 3505 to 3509.]

§ 1. Transportation and storage regulated.
§ 2. No receipts for oil not delivered.
§ 3. Duplicate receipts.
§ 4. Receipts not to be reissued.
§ 5. Receipts to be surrendered on delivery.
§ 6. Notice to be given before issue of duplicate.
§ 7. Receipts to be canceled on surrender.
§ 8. No oil to be sold without order.
§ 9. Monthly statements, posting.—Form.
§10. How amounts to be stated.
§11. Amount of balance to be kept on hand.

§12. Punishment for violation.
§13. Selling without owner's consent.
§14. Neglect to make monthly statements.
§15. Accepted orders and certificates to be negotiable.
§16. Pipe-line and storage companies to accept Act in writing.—Access for inspection of oil and books and tools.
§17. Examiner's certificate.—Examiner's powers.
§18. Appointment of examiners.—Pay.
§19. Powers of examiners.
§20. Duties of examiners.—Reports.
§21. Penalty for false report.
§22. Refusal of access a misdemeanor.
§23. Appropriation of fines.
§24. Payment of expenses.
§25. Not to interfere with appointment of inspector.

§ 1. Transportation and storage regulated.

Every corporation, company, association, person or persons who are now engaged, or shall hereafter engage or continue in the business of transporting or storing crude or refined petroleum, by means of pipe line or pipe lines, or storage by tanks, shall conduct such business in conformity with and subject to the provisions of this Act. (Act May 22, 1878; P. L. 104, § 1.)

§ 2. No receipts for oil not delivered.

No receipt, certificate, accepted order or other voucher shall be issued or put in circulation, nor shall any order be accepted or liability incurred for the delivery of any petroleum, crude or refined, unless the amount of such petroleum represented in or by such receipt, certificate, or accepted order, or other voucher or liability, shall have been actually received by and shall then be in the tanks and lines, custody and control of the corporation, company, association, person or persons issuing or putting in circulation such receipt, certificate, accepted order or voucher, or incurring such liability. (Acts May 22, 1878; P. L. 104, § 2.)

§ 3. Duplicate receipts.

No duplicate receipt, certificate, accepted order or other voucher shall be issued or put in circulation, or any liability incurred for any petroleum, crude or refined, while any former

liability remains in force, or any former receipt, certificate, accepted order or other voucher shall be outstanding and uncancelled, except in case such original paper shall have been lost; in which case a duplicate, plainly marked "duplicate" upon the face, and dated and numbered as the last original was dated and numbered, may be issued. (Act May 22, 1878; P. L. 104, § 3.)

§ 4. Receipts not to be reissued.

No receipt, voucher, accepted order, certificate, or written evidence of liability of such corporation, association, company, person or persons, on which petroleum, crude or refined, has been delivered, shall be reissued, used or put in circulation. (Act May 22, 1878; P. L. 104, § 2.)

§ 5. Receipts to be surrendered on delivery.

No petroleum, crude or refined, for which a receipt, voucher, accepted order, certificate or liability incurred, shall have been issued or put in circulation, shall be delivered, except upon the surrender of the receipt, voucher, order or liability representing such petroleum, except upon affidavit of loss of such instrument made by the former owner thereof. (Act May 22, 1878; P. L. 104, § 2.)

§ 6. Notice to be given before issue of duplicate.

No duplicate receipt, certificate, voucher, accepted order, or other evidence of liability shall be made, issued or put in circulation, until after notice of the loss of the original, and of the intention to apply for a duplicate thereof, shall have been given, by advertisement, over the signature of the owner thereof, in at least four successive issues of a daily or weekly newspaper published in the county where such duplicate is to be issued. (Act May 22, 1878; P. L. 104, § 2.)

§ 7. Receipts to be cancelled or surrendered.

Every receipt, voucher, accepted order, certificate, or evidence of liability, when surrendered, or the petroleum represented thereby delivered, shall be immediately cancelled, by stamping or puncturing the same across the face, in large and

legible letters, with the word "cancelled," and giving the date of such cancellation; and it shall then be filed and preserved in the principal office of such corporation, association, company, person or persons. (Act May 22, 1877; P. L. 104, § 2.)

§ 8. No oil to be sold without order.

No corporation, association, company, or the officers or agents thereof, or any person or persons engaged in the transportation or storage of petroleum, crude or refined, shall sell or incumber, ship, transfer, or in any manner remove, or procure or permit to be sold, incumbered, shipped, transferred, or in any manner remove from the tanks or pipes of said corporation, association, company, person or persons engaged in the business aforesaid, any petroleum, crude or refined, without the written order of the owner or owners thereof. (Acts May 22, 1878; P. L. 104, § 3.)

§ 9. Monthly statements, posting.—Form.

Any corporation, association, company, and the officers, agents, managers and superintendents thereof, and any persons that are now or may hereafter be engaged or continue in the business of transportation by pipe lines, or storing crude or refined petroleum, shall, on or before the tenth day of each month, make or cause to be made, and posted in the principal business office where such corporation, company, association, person or persons is or are or may be engaged in business, in an accessible and convenient place, for the examination thereof by any person desiring such examination, and shall keep so posted continuously until the next succeeding statement is so posted, a statement plainly written or printed, signed by the officer, agent, person or persons having charge of the pipes and tanks of said corporation, company, association, person or persons, and also by the officer or officers, person or persons, having charge of the books and accounts thereof, which statement shall show, in legible and intelligent form, the following details of the business:

I. How much petroleum, crude or refined, was in the actual and immediate custody of such corporation, company, association, person or persons, at the beginning and close of the previous month, and where the same located or held, describ-

ing in detail the location and designation of each tank or place of deposit, and the name of the owner;

II. How much petroleum, crude or refined, was received by such corporation, company, association, person or persons, during the previous month:

III. How much petroleum, crude or refined, was delivered by such corporation, company, association, person or persons, during the previous month:

IV. How much petroleum, crude or refined, such corporation, company, association, person or persons, were liable for the delivery or custody of, to other corporations, companies, associations or persons, at the close of such month;

V. How much of such liability was represented by outstanding receipts or certificates, accepted orders or other vouchers, and how much was represented by credit balances.

The statements so required to be made, shall also be sworn to by said officers, agent, person or persons, before some other officers authorized by law to administer oaths, which oath shall be in writing, and shall assert the familiarity and acquaintance of the deponent with the business and condition of such corporation, company, association, person or persons, and with the facts sworn to, and that the statements made in the said report are true.

VI. That all the provisions of this Act have been faithfully observed and obeyed, during the said previous months. (Act May 22, 1878; P. L. 106, § 5.)

§ 10. How amounts to be stated.

All the amounts in the statements required by this Act, when the petroleum is handled in bulk, shall be given in barrels and hundredths of a barrel, reckoning forty-two gallons to each barrel; and when such petroleum is handled in barrels or packages, the number of such barrels or packages shall be given; and such statements shall distinguish between crude and refined petroleum, and give the amount of each. Act May 22, 1878; P. L. 106, § 6.)

§ 11. Amount of balances to be kept on hand.

Every corporation, company, association, person or persons engaged in the business aforesaid, shall, at all times, have in

their tanks and pipes an amount of marketable oil equal to the aggregate outstanding receipts, accepted orders, certificates, vouchers, acknowledgments, evidences of liability, and credit balances upon the books thereof. (Act May 22, 1878; P. L. 106, § 6.)

§ 12. Punishment for violation.

Any corporation, company, association, person or persons who shall make or cause to be made, sign or cause to be signed, issue or cause to be issued, put in circulation or cause to be put in circulation, any receipt, accepted order, certificate, voucher, or evidence of liability, or shall sell, transfer or alter the same, or cause such sale, transfer or alteration, contrary to the provisions of this Act, or shall do or cause to be done any of the acts prohibited by the second section of this Act, or omit to do any of the acts by said section directed, shall be guilty of a misdemeanor; and on conviction thereof, shall be sentenced to pay a fine of not exceeding one thousand dollars, and undergo punishment not less than ten days nor exceeding one year. (Act May 22, 1878; P. L. 106, § 7.)

§ 13. Selling without owner's consent.

Any corporation, company, association, or officer or agent thereof, person or persons, who shall sell, incumber, transfer or remove, or cause or procure to be sold, transferred or removed, from the tanks or pipes of such corporation, company, association, person or persons, any petroleum, crude or refined, without the written consent of the owner or owners thereof, shall be guilty of a misdemeanor; and upon conviction thereof, shall be sentenced to pay one thousand dollars, and undergo an imprisonment not less than ninety days and not exceeding two years. (Acts May 22, 1878; P. L. 106, § 8.)

§ 14. Neglect to make monthly statements.

Any corporation, association, company, person or persons, engaged in the business of transporting by pipe lines, or storing petroleum, crude or refined, and each and every officer or agent of such association, corporation, company, person or persons, who shall neglect or refuse to make the report and

statement required by the fifth section of this Act, within the time and in the manner directed by said section, shall forfeit and pay the sum of five hundred dollars for each day after the tenth of the month that the report or statement required by said section 5 shall remain unposted as herein directed. (Act May 22, 1878; P. L. 106, § 9.)

§ 15. Accepted orders and certificates to be negotiable.

Accepted orders and certificates for petroleum, issued by any corporation or partnership association engaged in the business of transporting and storing petroleum in this State, shall be negotiable, and may be transferred by endorsement either in blank or to the order of another; and any person to whom the said accepted orders and certificates shall be so transferred, shall be deemed and taken to be the owner of petroleum therein specified. (Act June 20, 1883; P. L. 127, § 1.)

§ 16. Pipe lines and storage companies to accept Act in writing.—Access for inspection of oil and books.—Use of tools.

Every firm, association or corporation within this commonwealth, or engaged in the business of storing or transporting crude or refined petroleum by means of pipe lines, shall, on or before the first day of July, next ensuing, and every firm, association or corporation that may hereafter engage in said business, shall, before engaging therein, file in the office of the secretary of the commonwealth a writing authorizing any person or persons who may be appointed to inquire into the condition of such firm, corporation or association, under existing law or this Act, or any law that may be hereafter enacted, to enter upon and have free access to the premises of such firm, association or corporation, whether the same may be in this or some other State, or partly in this and partly in some other State or States, for the purpose of inspecting and gauging the petroleum, crude and refined, that may be in the custody of said firm, association or corporation, and of examining the books, accounts and papers thereof, relative to oil in its custody, and liability therefor, including oil owned by said firm, association or corporation. And the said writing shall

extend to and embrace full permission to use the tools, implements and appliances of said firm, association or corporation, for the purposes of making such inspection and gauge, and shall grant full and absolute authority for the business hereof, and shall remain good and valid so long as such firm, association or corporation continues to do business in this State. (Act July 5, 1883; P. L. 186, § 1.)

§ 17. Examiner's certificate.—Examiner's powers.

The person or persons who may be appointed under any law of this commonwealth, to make such examination, gauge and inspection, shall produce to the secretary of the commonwealth a certificate, attested by satisfactory proof of his or their appointment as such examiner or examiners, whereupon the secretary of the commonwealth shall issue to such examiner or examiners, a certified copy of the writing aforesaid, accompanied by a certificate, countersigned by the governor, that the person or persons therein named have been duly appointed to make such examination, inspection and gauge as aforesaid, and to exercise, under the appointment of the commonwealth the authority delegated under the writing aforesaid, for a period therein named, which shall not exceed thirty days; and it shall be the duty of any such firm, association or corporation, upon the production of such certificates and certified copy aforesaid to any of its officers or agents, to give without delay, to such examiner or examiners free access to its offices, and such books, papers, accounts, as show the amount of oil in its custody, and for which it is liable, including oil owned by said firm, association or corporation, and its tanks, stations and other property, and to furnish information regarding the same. But if such firm, association or corporation, its officers or agents, shall refuse or deny access to or entry upon the premises of such firm, association or corporation, or shall in anywise hinder, obstruct or prevent said examiner or examiners from making an examination, gauge and inspection of the books, papers, accounts aforesaid, and of the tanks and pipes of said firm, association or corporation, or shall wilfully withhold information regarding the same, or deny the use of its tools and appliances for the purpose of making such examination, inspection and gauge, such refusal, hindrance,

denial or obstruction shall work a forfeiture of the charter of any such corporation chartered by this commonwealth, or of the right to do business in this commonwealth of any such firm or association or foreign corporation; and in such case the right of such foreign corporation to bring suits in the courts of this State shall cease. In all cases where the tanks, pipes, books, offices, accounts and petroleum to be examined and gauged are situated in this State, it shall only be necessary for the examiner or examiners to produce to such firm, association or corporation, or to any of its officers or agents, a certificate of the court or other lawful authority, appointing him or them, showing him or them to be duly accredited and lawful examiner or examiners. (Acts July 5, 1883; P. L. 186, § 2.)

§ 18. Appointment of examiners.—Pay.

The owners of oil which is in the custody of any such firm, association or corporation, not less in the aggregate, than two percentum of the amount of oil in custody of such firm, association or corporation, as shown by its last preceding monthly statement, may, at any time, but not oftener than once in three months, present their petition to the court of common pleas of the county wherein such firm, association or corporation may have its principal office, and of any foreign corporation, to the court of common pleas in any county in which said corporation may be doing business, or to any law judge of said court in vacation, setting forth, under oath, their ownership, as aforesaid, and desire for the appointment of examiners for the purposes of this Act; whereupon the court, or any judge thereof in vacation, shall forthwith appoint such number of impartial, disinterested and competent persons as may be necessary not exceeding twenty-five, as examiners, one of whom shall be designated as chief, and the others shall be subordinates, and shall fix the amount of their compensation, which shall not exceed five dollars per day. (Act July 5, 1883; P. L. 186, § 3.)

§ 19. Powers of examiners.

The court or judge, by order, shall direct and empower such examiners under the supervision of their chief, to imme-

diately inspect and measure all the petroleum, crude or refined, in the custody of any such firm, corporation or association, named in said petition, on the day or days of inspection, and to examine the books of such firm, association or corporation, relating to the issue and cancellation of receipts, certificates, accepted orders, vouchers, or evidences of liability, and to its accounts with persons, companies or corporations with whom it deals in the receipt or delivery in crude or refined petroleum. Such examiners, when appointed, shall immediately be sworn, before any authorized officer, to perform his duties with fidelity and according to law; which oath shall be reduced to writing, signed and filed with the prothonotary; and they shall then, under supervision of the chief examiner, make immediate examination, gauge and inspection, as required by said petition and order, and by this Act. (Act July 5, 1883; P. L. 186, § 4.)

§ 20. Duties of examiners.—Reports.

Upon the completion of such inspection, examination and measurement, it shall be the duty of the examiner or examiners, or in the event of the death, resignation or declination, or inability to act of any of them, then the others or any of them, within thirty days after their appointment, to make to the court appointing them a written, signed and sworn report of such examination, inspection and measurement, and file the same of record with the prothonotary thereof, which report shall show:

I. How much merchantable, and also how much unmerchantable petroleum, crude or refined, they found in the tanks and lines of such firm, association or corporation, and where the same was located or held, by description of tanks, also the percentage of merchantable oil mingled with the B. S. and sediment.

II. For the custody or delivery of how much crude or refined petroleum they found such firm, association or corporation to be liable at the same date.

III. How much of such liability was represented by outstanding receipts, accepted orders, certificates, vouchers, or evidences of liability, and how much by credit balances. (Act July 5, 1883; P. L. 188, § 5.)

§ 21. Penalty for false report.

Any examiner appointed aforesaid, who shall make any false examination, inspection, measurement or report, or shall make known, directly or indirectly, to any person, any information he may become possessed of in the course of his examinations, inspections or measurements, except by means of his report, made and filed in accordance with this Act, or who shall receive, directly or indirectly, any fee, reward or benefit, or the promise of any fee, reward or benefit, other than that provided by this Act, for the performance or non-performance of any duty or thing contemplated by this Act, or connected with the said employment, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of one thousand dollars, and to imprisonment not less than three months, or more than two years. (Act July 5, 1883; P. L. 188, § 6.)

§ 22. Refusal of access a misdemeanor.

Any officer, agent, manager, superintendent or employee of any such firm, corporation or association as aforesaid, who shall neglect or refuse, after demand made, to give to any authorized examiner full and free access to any and all offices, pipes, tanks, accounts, books and vouchers as aforesaid, or deny to him the use of any tools or appliances as required by him in pursuance of his appointment and this Act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, and to imprisonment not exceeding one year. (Act July 5, 1883; P. L. 188, § 7.)

§ 23. Appropriation of fines.

All fines recovered from any person under this Act, and all penalties, shall be paid to the proper officer for the use of the county wherein such suit is brought or prosecution instituted. (Act July 5, 1883; P. L. 188, § 8.)

§ 24. Payment of expenses.

The examiners shall also file with their report an itemized and sworn statement of the entire expenses incurred in making

such examination, inspection and gauge, including their compensation, to be taxed as costs in other cases, and if allowed and approved by the court, the same shall be paid by the firm, corporation or association named in the petition within twenty days, and upon failure to do so, judgment may be entered forthwith in favor of the persons performing the services, for the amount due them, and against said firm, corporation or association, upon which execution may at once issue. (Act July 5, 1883; P. L. 188, § 9.)

§ 25. Not to interfere with appointment of inspectors.

Nothing contained in this Act shall be construed to interfere with any law authorizing the appointment of an inspector of oils. (Act July 5, 1883; P. L. 188, § 10.)

PIPE-LINE COMPANIES.

[Purdon's Digest, 3533-3537.]

§1. Act relating to manufacturing companies extended to companies for the transportation and storage of petroleum.
§2. May change location of pipes or construct branches.—Certificate of change.—Preference of pipe lines.
§3. Act of 1874 amended.—Pipe-line companies to be recorded.
§4. Power to hold real and personal property.—To acquire right of way.—Municipal license.—Crossing railroads and canals.—How fee acquired.—When pipes to be laid underground.—Damage by leakage.—How tanks to be protected.
§5. Proceedings to acquire right of way.

§ 1. Act relating to manufacturing companies extended to companies for the transportation and storage of petroleum.

The provisions of an Act relating to corporations for mechanical, manufacturing, mining and quarrying purposes, approved July 18, 1863, and the supplements thereto, be and the same are hereby extended to the transportation and storage of petroleum in the counties of Venango, Warren, Forest, Armstrong, Clarion, Butler, Crawford and Erie; and that any company organized for such purposes, under the provisions of said Act, shall have the right to transport, store, insure and ship petroleum, and for that purpose lay down, construct and maintain pipes, tubing, tanks, offices and such other machinery,

devices or requirements as may be necessary, and to enter upon, use and occupy such lands as may be requisite for the purposes of the company and for rights of entry upon lands, rights of way and the use of material necessary for the construction, maintenance and operation of pipes and fixtures as aforesaid, they shall be entitled to all the rights and privileges, and be subject to all the limitations and restrictions of railroad companies, as contained in the Act relating to railroad companies, approved February 19, 1899, and the supplements thereto: *Provided, however,* That nothing herein contained shall be construed to authorize the construction of any railroad. (Acts March 12, 1872; P. L. 22, § 1.)

§ 2. May change location of pipes or construct branches.—Certificate of change.—Preference of pipe lines.

Any company organized under the provisions of this Act may at any time change the location of the whole or any part of their pipes, or construct a branch or branches from any point or points on the main line, to any other point or place within the counties aforesaid; but before doing so, a majority of the directors of said company shall make, or cause to be made, a certificate in writing, setting forth the proposed change, particularly setting forth the routes and termini, and have the same acknowledged before a notary public, and recorded in the same manner as shall be provided in the original articles of the association: *Provided,* That no line of pipe shall be laid, under the authority of this act, within five miles of the State line for the purpose of carrying oil out of the State; and that the owners, producers and shippers of all oil intended for Philadelphia, Baltimore and New York, using pipe lines laid under this Act, shall give the preference to the lines of road traversing the greatest distance in this State, at the same rates for transportation. (Acts March 12, 1872; P. L. 22, § 2.)

§ 3. Act of 1874 amended.—Pipe line companies to be recorded.

[Companies may be incorporated for] the carrying on of any mechanical, mining, quarrying or manufacturing business, including all of the purposes covered by the provisions of the

Act of the general assembly, entitled "An Act to encourage manufacturing operations in this commonwealth," approved April 7, 1849, and entitled "An Act relating to corporations for mechanical, manufacturing, mining and quarrying purposes," approved July 18, 1863, and the several supplements to each of said Acts, including the incorporation of grain elevators, storage warehouse and storage yard companies; and also including the storage and transportation of water, with the right to take rivulets and land, and erect reservoirs for holding water and excluding the distilling or manufacture of intoxicating liquors, and companies may be organized under this Act, having the right to transport, store, insure and ship petroleum, and for that purpose to lay down, construct and maintain pipes, tubing, tanks, offices, and such other machinery, devices or arrangements as may be necessary to fully carry out that right; and also with the right to enter upon, take and occupy such land and other property as may be requisite for the purposes of such corporations. (Acts March 12, 1872; P. L. 23, § 3.)

§ 4. Power to hold real and personal property.—To acquire right of way.—Municipal license.—Crossing railroads and canals.—How fee acquired.—When pipes to be laid underground.—Damages by leakage.—How tanks to be protected.

All companies incorporated, or hereafter to be incorporated, under the provisions of the Act to which this is a supplement, for the purpose of the transportation and storage of oil, by means of pipe lines and tanks, for the public, shall have the power to take, hold, purchase and transfer such real and personal property as the purposes of the corporation may require, not exceeding the amount limited by the charter, together with the right to appropriate and take lands, easements and rights of way for locating and constructing steam pumps, tanks, pump houses and offices, and laying down its pipes or tubes, connections and trenches from any point or points in any of the counties in which petroleum is produced, to any railroad, canal, navigable river, port or city within this commonwealth, and for all necessary purposes of the corporation, including right to cross railroads, and the right to appropriate

a right of way and locate its pipes and tubes upon and over, under and across any lands, waters, streams, rivulets, roads, turnpike roads, canal or other public highway, not, however, passing through any burying ground or place of public worship, or any warehouse, mill, manufactory, store or dwelling-house without the consent of the owner: *Provided,* That when said pipe line is located through, over, under, upon the streets, lanes, alleys or highways within the corporate limits of any city or borough, the consent of the municipal authorities to said location shall be first had and obtained; which consent said municipal authorities are hereby empowered to give upon terms to be agreed upon by said city or borough authorities and said corporation: *And provided, further,* In case said pipe lines cross any railroad or canal, the same shall be located under or above the same, so, however, as not to interfere with the use of the same: *Provided, further,* That corporations organized under this Act and its supplements, shall not take a fee on any lands acquired under any of its provisions, except such as are acquired by actual purchase, and that upon the abandonment for the purposes of transporting oil, any lands taken by any company organized under the act to which this is a supplement and its supplements, said lands so taken, otherwise than by actual purchase, shall revert to the original owners or their successors: *And provided, further,* That any pipe line, so laying its pipes under the provisions of this Act, in occupying any lands cleared and used for agricultural purposes, shall bury the same at least 24 inches below the surface, and if any line of pipe shall be laid over or through waste or woodland, which shall afterwards be changed from waste or woodland to farming land, then it shall be the duty of the pipe line company to immediately bury the pipe, to the depth of at least 24 inches as aforesaid: *Provided,* That all pipe lines shall be laid above the flood lines or beneath the bed, in crossing creeks or rivulets: *And provided, further,* That any company laying a pipe line under the provisions of this Act shall be liable for all damages occasioned by leakage, breaking of pipes or tanks: *Provided, further,* That all tanks erected for the storage or transportation of oil, shall be protected and surrounded by ditches and embankments, so that, in case said tanks should break or be broken, the oil stored cannot damage adjoining property. (Acts June 2, 1883; P. L. 62, § 2.)

§ 5. Proceedings to acquire right of way.

In all cases when under the provisions of this Act, said corporation is permitted to take lands or property for the public purposes of said corporation, or to acquire right of way [or] easement, for the purpose of locating its pipes or branches over, upon, under or across any lands, streams, rivulets, roads, turnpike roads, railroads, canals or other highways and the said corporation cannot agree with the owner or owners of any such lands, road, turnpike road, railroad, canal or other highway or franchise, for the compensation proper for the damage done, or likely to be done to or sustained by any such owner or owners of said waters, streams, land, road, turnpike road, railroad, land or other highways, which such corporation may enter upon, use in pursuance of the authority herein given, or by reason of the absence or legal incapacity of any such owner or owners, no such compensation can be agreed upon, the court of common pleas of the proper county, on application thereto by petition, either by said corporation, or the owner or owners, or any one in behalf of either, shall appoint seven discreet and disinterested freeholders, residents of the proper county, and appoint a time, not less than twenty days, nor more than thirty days thereafter, for said viewers to meet at or upon the premises, where the damages are alleged to be sustained, or the property taken, of which time and place ten days' notice shall be given by the petitioner to the said viewers and the other party; and the said viewers, or any five of them, having been first duly sworn or affirmed, faithfully, justly and impartially to decide and to make a true report concerning all matters and things to be submitted to them, in relation to which they are authorized to inquire in pursuance of the provisions of this Act, and having viewed the premises, they shall estimate and determine the quantity, quality and value of said lands, streams, property, easement, franchise or rights of way so taken, and shall award to the owner or owners thereof just compensation for the property taken, injured or destroyed by the construction or enlargement of such pipe lines, works and improvements; which compensation shall be paid or secured as hereinafter provided, before such taking, injury or destruction: *Provided,* That for any subsequent injury, taking

or destruction of property, the owner or owners of the property taken, injured or destroyed, shall have the right to recover full compensation for such taking injury or destruction, and an action for any subsequent injury or taking or destruction of property, may be brought within the county in which the corporation defendant may have its principal place of business, and service may be made upon the president, secretary or other officer in charge of said principal office, to have the same effect as if the said corporation defendant was resident within the proper county, and make report thereof to the said court; and if any damages be awarded, and the report be confirmed by the said court, judgment shall be entered thereon; and if the amount thereof be not paid within thirty days after the entry of such judgment, execution may then issue thereon, as in other cases of debt, for the sum so awarded. And the costs and expenses incurred shall be defrayed by the corporation; and each of said viewers shall be entitled to two dollars and fifty cents per day, for each day necessarily employed in the performance of the duties herein prescribed, to be paid by such corporation. In all cases when the parties cannot agree upon the amount of damages claimed, or by reason of the absence or legal incapacity of such owner or owners, no such agreement can be made, either for lands, streams, waters, water rights, franchises, rights of way, the corporation shall tender a bond, with at least two sufficient sureties, to the parties claiming or entitled to any damages, or to the attorney or agent of any person absent, or to the guardian or committee of any one under legal incapacity, the condition of which shall be, that the said corporation will pay such amount of damages as the party shall be entitled to receive, after the same shall have been agreed upon by the parties, or assessed in the manner provided for by this Act: *Provided,* That in case the party or parties claiming damages refuse, or do not accept the bond tendered, the corporation shall then give the party a written notice of the time when the same will be presented for filing in court, and thereafter the said corporation may present said bonds to the court of common pleas of the county where the lands, streams, waters, rivulets, roads, railroads, turnpike roads, canals or other highways are; and if the sureties and the amount of the bond be

approved, the bond shall be filed in said court, for the benefit of those interested, and recovery may be had thereupon for the amount of damages assessed, if the same be not paid or cannot be made by execution on the judgment in the issue formed to try the question. The viewers provided for in this section may be appointed before or after the entry for constructing said work; and after the filing of the bond herein provided for, and upon the report of the said viewers, or any three of them being filed in said court, either party, within thirty days, may file his, her or their appeal from said report to said court. After such appeal, either party may put the cause at issue in the form directed by said court, and the same shall be tried by said court and a jury, and after final judgment, either party may have a writ of error thereto from the supreme court, in the manner prescribed in other cases; the said court shall have power to order what notices shall be given of the proceedings, and may make all such orders connected with the same, as may be deemed requisite; if any exceptions be filed, with any appeals, to the proceedings, the same shall be speedily disposed of, and if allowed, a new view shall be ordered; and if disallowed, the appeal shall proceed as before provided: *Provided, further*, That when the term "owner" is used in the foregoing section to this Act, or in this Act in reference to any effort to agree with, or to the tender of a bond to, or service of notice upon the owner of road, railroads, turnpike roads, canals or other highways, the same shall be taken to mean the officers in charge of said road, railroad, turnpike, well, canal or other public highways, on whom service of process could be made in any action at law or in equity: *Provided*, That all companies organized under this act, shall have their terminus in Pennsylvania. (Acts June 2, 1883; P. L. 63, § 3.)

NATURAL GAS COMPANIES.

NOTE.—By Act of May 29, 1885, P. L. 29, natural gas companies may be formed to furnish light and heat. The Act is a long one. By Act of May 11, 1897, P. L. 51, such companies are given the powers of eminent domain. The two Acts may be found in Purdon's Digest, 13th edition, pp. 3219 to 3227. Only the following sections are of public interest, as aside from the method of incorporation and powers of eminent domain:

PLUGGING WELLS.

§ 1. Consumers entitled to be furnished gas.
§20. Abandoned wells to be plugged.
§21. Penalty.
§22. Owners of adjacent lands may plug well.

§ 1. Consumers entitled to be furnished gas.

The transportation and supply of natural gas for public consumption is hereby declared to be a public use, and it shall be the duty of corporations, organized or provided for under this Act, to furnish to consumers along their lines and within their respective districts natural gas for heat or light or other purposes as the corporation may determine. (Act May 11, 1897; P. L. 51, § 1.)

§ 20. Abandoned wells to be plugged.

Whenever any well shall have been put down on lands of any company authorized by this Act for the purpose of exploring for, or producing gas, upon abandoning or ceasing to operate the same the company shall, before drawing the casing, fill up the well with sand or rock sediment to the depth of at least twenty feet above the gas-bearing rock, and drive a round, seasoned, wooden plug, at least two feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing, and immediately after the drawing of the casing shall drive a round, wooden plug into the well at the point just below where the lower end of the casing shall have rested, which plug shall be at least three feet in length, tapering in form, and to be of the same diameter at the distance of eighteen inches from the smaller end of the diameter of the well below the point at which it is to be driven. After the plug has been properly driven there shall be filled in on top of the same sand or rock sediment to the depth of at least five feet. (Act May 29, 1885; P. L. 36, § 20.)

§ 21. Penalty.

Any company which shall violate the proceedings of the preceding section shall be liable to a penalty of two hundred dollars, to be recovered as debts of like amount are by law recoverable. (Act May 29, 1885; P. L. 36, § 21.)

§ 22. Owners of adjacent lands may plug well.

Whenever any company shall neglect or refuse to comply with the provisions of this Act with regard to plugging wells, any owner of lands adjacent, or in the neighborhood of such unplugged well, may enter and take possession of said abandoned well and plug the same, as provided by this Act, at the expense of the company whose duty it may have been to plug the same. (Act May 29, 1885; P. L. 36, § 22.)

SUPPLEMENT to an act entitled "An Act to provide for the incorporation and regulation of natural gas companies," appproved the 29th day of May, 1885, providing that corporations engaged in the business of supplying natural gas may manufacture or purchase and transport and supply manufactured fuel.

[Acts 1917, p. 102.]

Section 1. Be it enacted, etc., that corporations engaged in supplying natural gas under the provisions of an act of the assembly, approved the 29th day of May, 1885, entitled "An Act to provide for the incorporation and regulation of natural gas companies," shall also have power to manufacture or purchase and to transport and supply manufactured fuel gas to the public, through their transportation and distribution lines to and into every district in which they are authorized to do business: *Provided, however,* That such manufactured fuel gas shall not be supplied in any district not theretofore supplied with natural gas, where an existing corporation has the right to supply and is supplying gas for light, heat or fuel purposes, or any of them, except with the consent of such corporation.

Approved the 26th day or April, A. D. 1917.

TAXATION.

A JOINT RESOLUTION.

Providing for the issuing of an invitation to neighboring States to a conference with respect to the taxing of oil, gas and bituminous coal.

BE IT RESOLVED (if the House of Representatives concur), That the Governor of the Commonwealth be requested to issue an invitation to the States of Ohio, West Virginia and Maryland, to participate in a joint conference with this State upon the subject of a tax of the same amount to be laid by such State upon oil, gas, and bituminous coal, and upon the method of laying the same; and

Be it Further Resolved, That upon the Governor of the Commonwealth receiving from the Governors of the States of Ohio, West Virginia and Maryland, an indication of the willingness of their respective States to participate in such conference, the Governor be, and he is hereby authorized, to appoint three delegates to meet and confer with delegates from all those States when the same shall be designated, at a time and place to be mutually agreed upon; and

Be it Further Resolved, That the expenses of such delegates to be paid out of a sum to be appropriated in the general appropriation bill, and be drawn from the State treasury upon the warrant of the chairman of the delegation, who shall be designated as such by the Governor. (Approved June 19, 1911.)

TENNESSEE.

PLUGGING WELLS.

§ 1. Encasing well.
§ 2. Abandoned wells to be filled up.
§ 3. Prevent waste of gas.
§ 4. Owners of adjoining lands may stop wells, when.
§ 5. Owner defined.
§ 6. Penalty.
§ 7. Equity courts may hear complaints.
§ 8. Emergency.

SENATE BILL No. 140.

AN ACT to regulate the drilling, maintenance, and operation of wells for the production of oil, gas, saltwater, or mineral water, requiring the same to be plugged when abandoned or not operated, prohibiting the waste of natural gas, and imposing penalties and providing remedies for neglect or refusal to case, plug, or shut in wells.

[Acts 1905, p. 789.]

§ 1. Encasing wells.

1. Be it enacted by the General Assembly of the State of Tennessee, That when any well shall be drilled for the production of petroleum oil, natural gas, salt water or mineral water, it shall be the duty of the owner thereof, before drilling said well into the oil and gas sand, to encase such well with good and sufficient wrought iron, steel, or metal casing in such manner as to exclude and shut out all surface water, salt water, or fresh water, and to prevent the same from reaching or penetrating said oil and gas sand.

§ 2. Abandoned wells to be filled up.

2. Be it further enacted, That it shall be the duty of any owner of any well drilled for any of the purposes mentioned in the first section of this Act, before abandoning or ceasing to operate the same and before drawing the casing therefrom, to fill up the well with sand or rock sediment to a depth of at least fifty feet above the top of the oil or gas-bearing sand or rock, and drive a round, seasoned wooden plug at least three feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing; and immediately after drawing the casing, except in regions where the well caves after the withdrawal of the casing, shall drive a round, seasoned plug at a point just below where the lower end of the casing rested; which plug shall be at least three feet in length, tapering in form, and of the same diameter at the distance of eighteen inches from the smaller end as the diameter of the hole below the point at which it is to be driven. After the plug has been properly driven, there shall be filled in on top of the same, sand or rock sediment to the depth of at least fifty feet above the top of the oil or gas-bearing sand or rock.

§ 3. Prevent waste of gas.

3. Be it further enacted, That it shall be the duty of any owner of any well producing gas, to prevent the waste of said gas by escape and within the time hereinafter limited, to shut in and confine the same in said well, or in the pipe or pipe lines connected therewith. Said gas, with respect to any well heretofore drilled, shall be so shut in within ninety days after the approval of this Act, and with respect to any well hereafter drilled or completed, shall be shut in within ninety days after the said well shall reach the lowest oil and gas sand defined or recognized in the gas or oil district in which said well is situated; but if any such well in the course of drilling shall pass through any oil and gas sand which produces gas above the said last or lowest oil and gas sand, then the drilling of said well to the last or lowest oil and gas sand shall be prosecuted with reasonable diligence, so that any waste of gas from the said upper sand shall not continue longer than shall be reasonably necessary. *Provided, however*, that this section of this Act shall not apply to any well producing both oil and gas from the same sand, or to any well while it is being operated as an oil well, or to any well drilled more than five years before the passage of this Act.

§ 4. Owners of adjoining lands may stop wells—when.

4. Be it further enacted, That if the owner of any such well shall neglect or refuse to cause said well to be plugged or shut in pursuant to the provisions of the second and third sections of this Act for a period of thirty days after a written notice so to do (which notice may be served personally upon such owner, or may be posted in a conspicuous place at or near the well), it shall be lawful for the owner or operator of any adjacent or neighboring lands to enter upon the premises where said well is situated and cause the same to be plugged, if it be an abandoned well, or shut in if not abandoned, pursuant to the provisions hereof; and the reasonable cost and expense incurred in so doing shall be paid by the owner of said well and may be recovered as debts of like amount are by law recoverable.

§ 5. Owner defined, etc.

5. Be it further enacted, That the term "owner," as herein used with reference to any well, shall mean and include each and every person, persons, co-partnership, partnership, association or corporation owning, managing, operating, controlling, or possessing said well as principal or principals; and the terms "oil and gas sand" or "sand" as herein used, shall mean and include any bed, seam, or stratum of rock, sand, or other material which produces, yields, or contains in quantity sufficient to be utilized, petroleum oil and natural gas, or either of them.

§ 6. Penalty.

6. Be it further enacted, That any person or persons, co-partnership, partnership, association, or corporation violating any of the provisions of this Act shall be liable to a penalty of one hundred dollars, to be recovered with costs of suit in any civil action to be brought in the name of the State of Tennessee, in any Circuit Court, and such action may be brought at the instance and upon the relation of any citizen of the State.

§ 7. Equity courts may hear complaints.

7. Be it further enacted, That aside from and in addition to the imposition of any penalties under this Act, it shall be the duty of any Chancery Court in the exercise of its equitable jurisdiction, to hear or determine any bill or bills in equity which may be filed to restrain the waste of natural gas in violation of this Act, and to grant relief by injunction or by other decrees or orders, in accordance with the principals and practice in equity. The complaint in such bill shall have sufficient standing to maintain the same if he shall aver and prove that he is interested in the lands situated within the distance of one mile from said well, either as an owner of such land in fee simple, or as an owner of leases thereof, or of rights therein for the production of oil and gas or either of them.

§ 8. Emergency.

8. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it. (Passed April 7, 1905.)

TEXAS.

PIPE LINES.

§1. Object of incorporation.
§2. Manner of incorporation.
§3. Powers.
§4. Exercise of eminent domain.
§5. Borrowing money.—Mortgages.
§6. Discrimination unlawful.
§7. Emergency.
§8. Pipe lines.

SENATE BILL No. 332.

AN ACT to provide for the organization of corporations for the purpose of the storage and transportation, and purchase and sale of oil, gas, salt, brine and other mineral solutions; to provide the manner and method of organizing such corporations; to prescribe the rights, powers, privileges and duties of such corporations; to authorize such corporations to conduct, operate and maintain pipe lines, tanks, pump stations, buildings, machinery, apparatus and devices as may be necessary; to own and occupy lands, easements, buildings and structures; to empower such corporations to condemn lands and other property for the uses and purposes of such corporations, and to provide the methods therefor; issue stock and bonds and to borrow money and mortgage its franchise and property.

[Acts 1899, p. 202.]

BE IT ENACTED by the Legislature of the State of Texas:

§ 1. Object of incorporation.

1. Any number of persons, not less than three, may organize themselves into a corporation for the purpose of storing, transporting, buying and selling of oil and gas, salt, brine and other mineral solutions in this State.

§ 2. Manner of incorporation.

2. The manner and method of organizing such corporations shall be the same as provided by law for the organization of

private corporations in Chapter 2, Title 21, of the Revised Civil Statutes of the State, and the provisions of this Act shall apply to all corporations already organized for any of the purposes of this Act.

§ 3. Powers.

3. Such corporations shall have power to store and transport oil and gas, brine and other mineral solutions, and to make reasonable charges therefor; to buy, sell and furnish oil and gas for light, heat and other purposes; to lay down, construct, maintain and operate pipe lines, tubes, tanks, pump stations, connections, fixtures, storage houses, and such machinery, apparatus, devices and arrangements as may be necessary to operate such pipes and pipe lines between different points in this State; to own, hold, use and occupy such lands, rights of way, easements, franchises, buildings and structures as may be necessary to the purpose of such corporation.

§ 4. Exercise of eminent domain.

4. Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, rights of way, easements and property of any person or corporation, and shall have the right to lay its pipes and pipe lines across and under the public road or under any railroad, railroad right of way, street railroad, canal or stream in this State, and to lay its pipes and pipe lines across or along and under any street or alley in any incorporated city or town in this State, with the consent and under the direction of the board of aldermen or city council of such city or town. The manner and method of such condemnation shall be the same as is provided by law in the case of railroads: *Provided,* That such pipe or pipe lines shall not pass through or under any cemetery, church or college, schoolhouse, residence, business or storehouse, or through or under any building in this State, except by the consent of the owner or owners thereof: And *provided further,* That all such pipes and pipe lines, when same shall pass through or over the cultivated or improved lands of another, shall be well buried under ground at least twenty inches under the surface, and such surface shall be properly and promptly restored

by such corporation unless otherwise consented to by the owner or owners of such land: *Provided, further,* That if such pipe or pipe line shall be laid over or along any uncultivated or improved lands of another, and such lands shall thereafter become cultivated or improved, such pipes or pipe lines shall be buried by said corporation as hereinbefore provided, within a reasonable time after notice by the owner of such lands, or his agent, to said corporation or any agent thereof; and provided further, that whenever such pipe or pipe line shall cross any public road or highway, railroad, street railroad, or street or alley, the said pipes and pipe lines shall be so buried and covered as not to interfere with the use and occupancy of such road, highway, street or alley by the public, or use and occupancy of such railroad or street railroad by the owner or owners thereof; and provided, further, that such pipe line so laid shall not exceed eight inches in diameter.

§ 5. Borrowing money.—Mortgage.

5. Such corporation shall have the right to borrow money to issue stock and preferred stock, to mortgage its franchise and property to secure the payment of any debt contracted for any of the purposes of such corporation, and shall possess all the rights and powers of corporation for profit in this State wherever the same may be applicable to corporation of this character.

§ 6. Discrimination unlawful.

6. It shall be unlawful for any corporation organized under this Act to discriminate against any person, corporation, firm, association, or place in charge for such storage or transportation or in the service rendered; but shall receive, store or transfer oil and gas for any person, corporation, firm, or association upon equal terms, charges and conditions with all other persons, corporations, firms, associations for like service.

§ 7. Emergency.

7. The near approach of the close of the present session of the Legislature, the crowded condition of the calendar, and

the importance of this legislation, create an emergency and an imperative public necessity authorizing the suspension of the constitutional rule requiring bills to be read on three several days, and that this Act take effect and be in full force from and after its passage, and it is so enacted.

(NOTE.—The enrolled bill shows that the foregoing Act passed the Senate by a two-thirds vote—yeas, 20, nays 3—and passed the House of Representatives by a two-thirds vote—yeas 91, nays 0.)

Approved May 15, 1899.

Takes effect May 15, 1899.

§ 8. Pipe line companies.

Each and every individual, company, corporation or association, whether incorporated under the laws of this State or of any other State or Territory or of the United States, or of any foreign nation, which owns, manages, operates, leases or rents any pipe line or pipe lines within this State, whether such pipe line or pipe lines be used for transmission of oil, natural or artificial gas, whether such oil or gas be for illuminating or fuel purpose, or for steam, for heat or power, or for any other purposes, and whether such pipe line or pipe lines be used for the transmission of articles by pneumatic or other power, shall, on or before the first days of January, April, July and October of each year, pay to the State of Texas an occupation tax equal to two per cent of its gross receipt, if such pipe line or pipe lines lie wholly within this State; and if such pipe line or pipe lines lie partly within and partly without the State, such individuals, companies, corporations and associations shall pay a tax equal to two per cent of such proportion of its gross receipt, as the length of such line or lines within the State bears to the whole length of such line or lines; provided, that if satisfactory evidence is submitted to the comptroller of public accounts at any time prior to the date fixed by this article for the payment of the tax herein imposed, that any other proportion more fairly represents the proportion which the gross receipts of any pipe line or pipe lines for any quarter within this State bears to its total gross receipt, it shall be his duty to collect for such quarter from every such pipe line or pipe lines a tax equal to such other proportion of two per cent of its gross receipt. For the

purpose of determining the amount of such tax, the individual or the president, treasurer or superintendent of such company, association or corporation shall quarterly, on the dates aforesaid, make a report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross receipt of such pipe line or pipe lines from every source whatsoever for the quarter next preceding and shall immediately pay to the State Treasurer an occupation tax for the quarter beginning on said date, calculated on the gross receipt so reported. (Id., sec. 6.)

[Acts 1907, p. 479, § 6; 4 Verson's Sayles Consolidated Statutes, § 7374.]

WELLS—OIL, GAS AND WATER.

Art. 7847. Wells, how cased.
Art. 7848. Abandoned wells to be filled, consequences of failure.
Art. 7849. Gas to be confined until utilized.
Art. 7850. Limitations as to use of gas for illuminating purposes.
Art. 7851. Penalties and disposition of fines.
Art. 7852. Duty of persons where salt water appears in wells.
Art. 7853. District court, jurisdiction and supervision; may appoint superintendents, make regulations, etc.
Art. 7854. Suits and penalties, how brought.
Art. 7854a. Wells to be plugged or shut in, etc.
Art. 7854b. Petition to restrain waste of gas; duty of district judge.

[4 Vernon's Sayles Civ. Statutes, §§ 7847 to 7851.]

Art. 7847. Wells, how cased.

The owner or operator of any well being constructed for the production of petroleum oil, natural gas or mineral water shall, before drilling into the oil or gas bearing rock in case such well with good and sufficient wrought iron or steel casing, in such manner as shall exclude all surface or fresh water from the lower part of such well from penetrating the oil or gas bearing rock. Should any well be drilled through the first into a lower oil or gas bearing rock, the same shall be cased in such a manner as will exclude all fresh water above the last oil or gas bearing rock penetrated. (Acts 1899, p. 68.)

Art. 7848. Abandoned wells to be filled.

The owner or operator of any well constructed for either or any of the purpose named in the preceding article, when about to abandon or cease operating the same, and before drawing the casing therefrom shall securely fill such well with rock, sediment or with mortar, composed of two parts sand and one part cement or other suitable material to the depth of two hundred feet above the top of the first oil or gas bearing rock, and also in such manner as shall prevent gas or oil escaping therefrom. If the owner or operator of any such well shall fail to or shall inefficiently comply with the provisions of this article, then the owner of the land upon which the well is situated shall forthwith comply therewith. If all the persons hereinbefore named shall fail to or inefficiently fill such well in the manner hereinbefore described, then it shall be lawful for any person, after written demand therefor to any said persons, to enter the premises where such well is situated, take possession thereof and fully comply with the provisions of this article. The reasonable cost and expense thereof shall forthwith be paid by the owner or operator of the well, and on his default by the owner of the land. The amount of such reasonable cost and expense shall forthwith be a lien upon the fixtures and machines and leasehold interest of the owner and operator of said well, as upon the title and interest of the landowner in the land upon which said well is situated, and may be recovered and enforced against said owner or operator, in the order named, in any court of competent jurisdiction. (Id., sec. 2.)

Art. 7849. Gas to be confined until utilized.—Penalty.

Any person, co-partnership or corporation in possession, either as owner, lessee, agent or manager of any well producing natural gas, in order to prevent the said gas from wasting by escape, shall within ten days after penetrating the gas bearing rock in any well hereafter drilled, shut in and confine the gas in said well until and during such time as the gas therein shall be utilized for light or fuel power; provided, that this shall not apply to any well that is operated for oil. Any person violating the provisions of this article shall be liable to a penalty of not less than $300.00 for each offense, to be recovered, with the costs

of suit, in a civil action in the name of the State of Texas, in any court of competent jurisdiction in the county in which the act shall be committed or omitted, and each day such violation continues shall be considered a separate offense. Such suit may be brought at the instance of any resident of the State of Texas, without security or liability of cost. The amount of said penalty, when collected, shall be paid one-half into the school fund of the county in which said suit is brought, and one-half to said person at whose instance said suit shall be brought. (Acts 1899, p. 68, sec. 3. Acts 1913, p. 212, sec. 1, amending Art. 7849, Rev. St., 1911.)

Art. 7850. Limitations on use of gas for illuminating purpose.

It shall be unlawful for any person, co-partnership or corporation to use natural gas for illuminating purpose by what are known as flambeau lights; but nothing herein shall prohibit the use of "Jumbo" burners, or any other burners consuming no more gas than such "Jumbo" burners, but the person, co-partnership or corporation consuming such gas and using such burners in the open air shall inclose the same in glass globes or lamps; and anyone using such gas in the open air, or in or around derricks, shall turn off said gas not later than eight o'clock in the morning of each day such lights are burning or used and shall not turn on or relight the same between the hours of eight o'clock a. m. and five o'clock p. m. (Acts 1899, p. 68, sec. 4.)

Art. 7851. Penalties.—Disposition of fines.

Any person, co-partnership or corporation violating any of the provisions of this chapter shall be liable to a penalty of one hundred dollars, to be recovered with the cost of suit in a civil action, in the name of the State of Texas, in any court of competent jurisdiction in the county in which the act shall be committed or omitted. Such suit may be brought at the instance of any resident of the State of Texas, without security or liability of cost. The amount of said penalty when collected shall be paid, one-half into the school fund of the county in which said suit is brought, and one-half to said person at whose instance said suit shall be brought. (Id., sec. 5.)

ORGANIZING OIL COMPANIES.

[Acts 1915, p. 225.]

Authorizing oil companies to prospect for, develop and use coal and other minerals.

CHAPTER 144.

SENATE BILL No. 282.

AN ACT to amend Title 25, Chapter 2, Article 1121, Subdivision 16, Revised Statutes of Texas, 1911, providing for the creation of private corporation for the establishing and maintenance of oil companies with authority to contract for, lease and purchase of the right to prospect for, develop and use coal and other mineral, by adding thereto the right to contract for the lease and purchase, of the right to prospect for, develop and use gas; and declaring an emergency.

Be it enacted by the Legislature of the state of Texas:

Section 1. That article 1121, subdivision 16, of title 25, chapter 2, of the Revised Statutes of the State of Texas, 1911, to be amended so as to hereafter read as follows:

"For the establishment and maintenance of oil companies with the authority to contract for the lease and purchase of the right to prospect for, develop and use coal and other minerals, petroleum and gas; also the right to erect, build and own all necessary oil tanks, cars and pipes necessary for the operation of the business of same."

Sec. 2. All private corporations heretofore created under the provisions of subdivision 16, article 1121, chapter 2, title 25, Revised Statutes of Texas of 1911, shall, in addition to the powers therein enumerated, have the power to contract for the lease and purchase of the right to prospect for, develop and use gas; also erect, build and own all necessary oil tanks, cars and pipes necessary for the operation of the business of same.

Section 3. The fact that there is no authority for the creation of corporation to contract for the leases and purchase of right to prospect for, develop and use gas creates an emergency and an imperative public necessity that the constitutional rule requiring that bills be read on three several days be suspended, and said rule is hereby suspended and that this Act take effect and be in force from and after its passage, and it is so enacted.

(NOTE.—S. B. No. 282 passed the Senate March 19, no vote given. Passed the House March 19, no vote given.)

Approved March 31, 1915.

Take effect 90 days after adjournment.

NOTE.—The above is an amendment of a very long statute on the formation of all kinds of corporations. No other part of the statute has any particular provision relating to oil or gas.

(NOTE.—There is now pending in Congress a bill providing for the leasing of public lands for the development of oil and gas. If it becomes a law, copies of it can be procured from the Secretary of State.

UNITED STATES.

§ 1. Entry and patenting of lands containing petroleum under placer mining laws.
§ 2. Mining laws extended to saline lands.
§ 3. Assessments on oil mining claims.
§ 4. Withdrawal of public land in certain cases.
§ 5. Title to oil lands.

§ 1. Entry and patenting of lands containing petroleum under the placer mining laws.

Any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor under the provisions of the laws relating to placer mineral claims: Provided, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed or improved as mineral but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof. (Act of Congress approved February 11, 1897.)

§ 2. Mining laws extended to saline lands.

All unoccupied lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer mining claims: Provided, That the same person shall not locate or enter more than one claim hereunder. (Act of Congress approved January 31, 1901.)

§ 3. Assessments on oil mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not

exceeding five claims in all: Provided, That said labor will tend to the development or to determine the oil-bearing character of such contiguous claims. (Approved February 12, 1903.)

AN ACT to authorize the President of the United States to make withdrawals of public lands in certain cases.

§ 4. Withdrawal of public lands.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas-bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And provided further, That this Act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights of claims initiated upon any oil or gas-bearing lands after any withdrawal of such lands made prior to the passage of this Act: And provided further, That there shall be excepted from the force and effect of any withdrawals made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry heretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not con-

tinue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: And provided further, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado or Wyoming, except by Act of Congress.

That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

Approved, June 25, 1910.

AN ACT to protect the locators in good faith of oil and gas lands who shall have affected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest.

§ 5. Title to oil lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified person or persons, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: Provided, however, That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry.

Approved, March 2, 1911.

WITHDRAWAL OF PUBLIC LANDS FROM ENTRY BY PRESIDENT.

§ 1. Temporary withdrawals by President for power sites, irrigation, etc., authorized.
§ 2. Mineral rights continued.—Rights of bona fide oil or gas claimants.
§ 3. Reports of withdrawals to Congress.
§ 4. Locators of mineral oil lands protected.
§ 5. Agreements for working reserved lands before issue of patents.—Naval petroleum reserves.
§ 6. Agricultural entry of lands withdrawn as oil lands.
§ 7. Issue of conditional patent bond.
§ 8. Conditional mineral patents.

AN ACT to authorize the President of the United States to make withdrawals of public lands in certain cases.

§ 1. Temporary withdrawals by President for power sites, irrigation, etc., authorized.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (June 25, 1910; 136 Stat. at L. 847.)

§ 2. Mineral rights continued.—Rights of bona fide oil or gas claimants.

"Sec. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided,* That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: *Provided, further,* That this

Act shall not be construed as a recognition, abridgement or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: *And provided further,* That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further,* That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California Oregon, Washington, Idaho, Montana, Colorado or Wyoming, except by Act of Congress." (As amended Aug. 24, 1912, 37 Stat. at L. 497.)

§ 3. Reports of withdrawals to Congress.

That the Secretary of the Interior shall report all withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals. (Act of June 25, 1900, 36 Stat. at L. 847.)

AN ACT to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest.

§ 4. Locators of mineral oil lands protected.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other

respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: *Provided, however,* That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry. (As amended March 2, 1911, 36 Stat. at L. 1015.)

§ 5. Agreements for working reserved lands before issue of patents.—Naval petroleum reserves.

"Sec. 2. That where applications for patents have been or may hereafter be offered for any oil or gas land included in an order of withdrawal upon which oil or gas has heretofore been discovered, or is being produced, or upon which drilling operations were in actual progress on October third, nineteen hundred and ten, and oil or gas is thereafter discovered thereon, and where there has been no final determination by the Secretary of the Interior upon such applications for patent, said secretary, in his discretion, may enter into agreements, under such conditions as he may prescribe with such applicants for patents in possession of such land or any portions thereof, relative to the disposition of the oil or gas produced therefrom or the proceeds thereof, pending final determination of the title thereto by the Secretary of the Interior, or such other disposition of the same as may be authorized by law. Any money which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be set aside for the needs of the navy and deposited in the treasury to the credit of a fund to be known as the Navy Petroleum Fund, which fund shall be applied to the needs of the navy as Congress may from time to time direct, by appropriation or otherwise." (As amended Aug. 25, 1914, 38 Stat. at L. 708.)

AN ACT to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas or asphaltic minerals.

§ 6. Agricultural entry of lands withdrawn as oil lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands

withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry or purchase, if otherwise available, under the non-mineral land laws of the United States, whenever such location, selection, entry or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine and remove the same; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: *Provided,* That all applications to locate, select, enter or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act. (Acts of July 17, 1914, 38 Stat. at L. 509.)

§ 7. Issue of conditional patent.—Bond.

Sec. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry or purchase is made, the locator, selector, entryman or purchaser shall be entitled to a patent to the land located selected, entered or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in the land, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident

to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: *Provided,* That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil gas or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered or purchased lands subsequently withdrawn or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase or approval of selection or location, that the lands entered, selected or located are in fact non-mineral in character. (Act of July 17, 1914, 38 Stat. at L. 509.)

§ 8. Conditional mineral patents.

Sec. 3. That any person who has, in good faith, located, selected, entered or purchased, or any person who shall hereafter locate, select, enter or purchase under the non-mineral land laws of the United States, any lands which are subsequently withdrawn, classified or reported as being valuable for phosphate, nitrate, potash, oil, gas or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified or reported as being valuable, together with the right to prospect for, mine, and remove the same. (Act of June 17, 1914, 38 Stat. at L. 509.)

PATENTS FOR OIL LANDS IN WITHDRAWN AREAS—ACT OF AUGUST 25, 1914.

[Instructions.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, November 20, 1914.

The SECRETARY OF THE INTERIOR.

SIR: I beg to submit herewith for your consideration and approval proposed instructions and forms of application and agreement for use under the Act of August 25, 1914 (38 Stat. at L. 708), authorizing the Secretary of the Interior, under certain conditions in the Act provided, to enter into agreements with the applicants for patents for oil lands in withdrawn areas pending determination of title.

The papers submitted consist of (*a*) form of application, (*b*) instructions, and (*c*) form of agreement. It is intended if these instructions and forms are approved to print same entirely on one double sheet of paper.

I have the honor to recommend the approval of the papers submitted.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, November 21, 1914.
A. A. JONES,
First Assistant Secretary.

APPLICATION FOR AGREEMENT UNDER THE ACT OF AUGUST 25, 1914 (38 STAT. L., 708).

.....
....., 191 .

The undersigned, ..., hereby applies for an
(Name of applicant.)

agreement or contract with the Secretary of the Interior for the disposition of oil and gas from the lands hereinafter described, as authorized under the act of Congress, approved August 25, 1914 (38 Stat., 708). In support of said application this applicant respectfully represents as follows, which representations the said applicant hereby warrants to be true and correct.

1. That is the identical person or corporation, who under date
(He or it.)

of filed in the local land office at, State of, mineral application, serial number for the placer claim , embracing of section, township, range, in the land district, State of

2. That the applicant desires the contract or agreement herein applied for to embrace the following-described lands:

.....

3. That oil or gas was discovered, or was being produced, upon the lands covered by this application on or before August 25, 1914, *or* drilling operations were in actual progress on October 3, 1910.

(Strike out whichever is not appropriate.)

4. That, so far as known to applicant, the following enumerated persons or corporations are the only ones claiming any right, title, or interest in and to said lands or any portion thereof, or to the oil or gas produced therefrom, and their respective interests are herein set forth.

Name.	Interest.
.....	
.....	

(A fuller statement of interest may be attached if desired.)

5. That the number of wells being operated on the land covered by this application for an agreement or contract is and the approximate daily gross production of each well at the present time is as follows:

6. That contracts for the sale and purchase of the oil and gas products arising from the operations to be carried on under the agreement herein applied for, on the lands covered thereby, have been entered into with the following and no others:

.....

Duly authenticated copy of each of said contracts is hereto attached and made a part of this application.

7. That the portion of the gross proceeds arising from the sale of the oil and gas which is to be placed in escrow during the life of the contract or agreement herein applied for, will be deposited in the

(Must be a national bank.)

There is hereto attached a statement by the of said

(Officer.)

bank which sets forth the rate of interest to be allowed on said escrow deposit and the method by which said interest is to be computed.

8. That there are hereto attached duly executed waivers by each and every one of the parties claiming an interest as specified in paragraph four, releasing the United States from any claim or demand whatsoever arising from the execution of this agreement by the Secretary of the Interior.

.....

(Name of applicant.)

(Corporate seal if corporation be the applicant.)

.....

(Address.)

..... being first duly sworn, deposes and says he is the
named in the foregoing application; that he has read the foregoing application and knows the contents thereof and that the facts therein stated are true according to the best of his knowledge, information, and belief.

.....

Subscribed and sworn to before me this day of

.....,

Notary Public.

INSTRUCTIONS.

1. This application can be made and the contract executed only by an applicant for mineral patent for oil or gas lands embraced in an order of withdrawal.

2. The application and the contract must be executed in triplicate and filed in the local land office in the district in which the lands are situated. One set only of the exhibits accompanying the application need be authenticated, but the others must be true copies.

3. In the option of the applicant, the application and contract may cover all the land embraced in the application for patent or one or more legal subdivisions thereof.

4. The form of waiver provided for in section 8 of the application must be absolute and unconditional, and if by a corporation, proper evidence of authority for the execution of such instrument must be attached.

5. Immediately upon filing of the application and contract, properly executed, the register and receiver will assign to them the same serial number that the application for patent bears and will forthwith transmit them by special letter to the Commissioner of the General Land Office.

AGREEMENT.

Under Act of August 25, 1914 (38 Stat. L., 708), for disposition of oil and gas products pending determination of proceedings for patent.

This agreement made and entered into by and between the Secretary of the Interior, acting for and in behalf of the United States, party of the first part, and, hereinafter called the applicant, party of the second part:

Witnesseth, That for and in consideration of the attached application and of the mutual covenants and agreements hereinafter provided, and the rights and privileges hereby granted, the parties hereto agrees as follows:

1. That this agreement is made on the basis of the statements and representations made by the applicant in the attached application, which statements and representations the applicant warrants to be true and correct; it being further agreed that in case such statements and representations shall be found by the Secretary of the Interior to be untrue or incorrect in any material respect, such finding shall render this agreement subject to cancellation by said Secretary at his option and on notice to the party of the second part.

2. That commencing on the date of this agreement, and continuing for the period pending the determination by the Secretary of the Interior of

the title to the land embraced in the attached application, or such other disposition of the same as may be authorized by law, under the rules, regulations, and practice of the land department of the United States, said applicant and all persons claiming by, through, or under him, as indicated in the attached application, shall be authorized to work and operate in and upon said lands for the production of oil and gas therefrom, in the manner and on the terms and conditions herein provided and not otherwise.

3. That the applicant shall conduct all drilling, pumping, and other operations for the production, storage, and sale of the oil and gas products from said land in workmanlike manner in accordance with approved practices and methods of operation for the prevention of waste or damage to said lands, or to other lands, for oil and gas producing purposes; and to this end applicant agrees to comply promptly and at his own expense with all reasonable rules, regulations, and requirements of the said Secretary of the Interior, his duly authorized agents and representatives, for the prevention of damage and waste as aforesaid.

4. That all of the oil and gas products of a marketable character arising from the operations provided for in the last preceding paragraph shall be sold and disposed of in accordance with the contract or contracts for the sale and purchase of such products submitted with, and as a part of, the attached application, or such other contract or contracts as may hereafter be entered into with the approval of the Secretary of the Interior.

5. That one-eighth of the gross proceeds arising from the sale of such oil and gas products, as provided in the preceding paragraph, shall be deposited by the purchaser or purchasers thereof, in the national bank designated in said application, to be held by said bank in escrow, as in this contract provided, such payments to be made monthly on or before the tenth day of each month for all oil and gas sold during the preceding month; the balance (seven-eighth of such gross proceeds) shall be paid to the party or parties entitled thereto; full and detailed statements of accounts of sales and purchases, as aforesaid, shall be made by said purchaser in triplicate, one to accompany the payment to said bank, one to the Chief of Field Division of the General Land Office in whose division said land is situated, and one to the party of the second part.

6. That said portion of the gross proceeds, to be deposited in said bank in escrow, as provided in the last preceding paragraph, shall be subject to change by the Secretary of the Interior at any time on 30 days' notice: *Provided*, That in case such portion shall be increased, it shall be optional with the second party to continue under this agreement: *Provided further*, That notice to discontinue operations hereunder shall be filed in the proper United States Land Office within 10 days after the receipt of notice of such increased amount to be deposited in escrow.

7. That all interest accruing on the portion of such gross proceeds, deposited in said bank in escrow as aforesaid, shall be added to the principal at regular intervals in accordance with the previous understanding with said bank as indicated in the attached application; that in case the land department of the United States shall finally determine that under the law, rules, and regulations controlling the granting of patents to mineral lands, said second party is entitled to a patent to the land and premises

described and applied for in said mineral application and embraced by this contract, then and in that case, on the issuance of said patent the Secretary of the Interior shall so certify to said bank, whereupon said bank shall be authorized and deemed instructed by the parties hereto, to pay over all moneys deposited therein under the terms hereof, with accumulated interest, to the second party; but in case the land department of the United States shall finally determine, in accordance with the law, its rules, regulations, and practice, that the second party is not entitled to patent for the lands and premises embraced in this agreement, and same shall be finally rejected, *then* on receipt of the certificate of the Secretary of the Interior to that effect said bank shall be authorized, and it shall be deemed to be instructed by the parties hereto, to pay over all of said payments and accrued interest to the Treasurer of the United States, whereupon all and every claim, right, title, or interest in said funds and accumulated interest, either on the part of the second party or any person claiming by, through, or under him, shall cease and terminate; in either of the cases above described, operations under this contract shall cease and terminate on the issuance of the certificate of the Secretary of the Interior as aforesaid; but in case this contract shall, under any of the provisions hereof, be canceled prior to the final determination of the matter of said application for patent, any moneys theretofore, deposited in escrow shall nevertheless remain so deposited until said application for patent shall be finally approved or rejected.

8. That in case a portion of the land embraced in this agreement shall be finally patented to applicant, and patent shall be denied for the remainder thereof, then such escrow deposits and accumulated interest hereinabove provided for shall be paid to the applicant and to the Treasurer of the United States in such proportion as the area patented shall bear to the area for which patent shall be denied, as shown to said bank by the certificate of the Secretary of the Interior.

9. That the said purchaser of the oil and gas products and the said bank shall be furnished with copies hereof by the party of the first part, and same shall be deemed and constitute joint instructions to them respectively in so far as applicable.

10. That all the workings, operations, premises, equipment, books, and records of the second party, or any person claiming by, through, or under him, pertaining to, or included in, the subject matter of this agreement, shall, at all times, be subject to inspection by the authorized representatives of the Department of the Interior, and such books, records, and accounts shall be kept and such reports made as the first party by the Secretary of the Interior or his authorized representatives shall, from time to time, direct.

11. Such deposits in escrow, when paid over to the Treasurer of the United States as herein provided, shall be and constitute full and complete payment, settlement, accord, and satisfaction of all claims of the United States for trespass for any and all oil and gas removed from said premises during the period of, and under and subject to, this agreement, as against the applicant, producers or purchaser of such oil or gas products, who shall have in good faith and with out collusion done and performed each

and every act herein required to be performed by him or it strictly with this agreement, even though said application for patent shall be denied.

12. That this contract shall be binding on the heirs, assigns, and legal representatives of the second party hereto.

13. That in no case and under no circumstances or conditions shall the United States become liable to any person whatsoever under or by reason of this contract, or any of its provisions.

14. That failure or default on the part of the second party to comply strictly with the terms hereof shall render this contract subject to cancellation by the Secretary of the Interior at his option immediately on notice of such cancellation to the second party, and the decision of the said Secretary shall be final on the question of the existence of such failure or default.

15. That no Member of or Delegate to Congress, or Resident Commissioner, or officer or employee of the Department of the Interior, is or shall be admitted to any share or part in this agreement, or derive any benefit which may arise therefrom, and the provisions of section 3741 of the Revised Statutes of the United States, and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States, approved March 4, 1909 (35 Stat., 1109), relating to contracts, enter into and form a part of this agreement, so far as the same may be applicable.

In witness whereof, the said parties hereto have caused the execution of these presents by themselves or by their duly authorized officers, agents, or representatives, as of the day of, 191...

.....

Secretary of the Interior.

.....

.....

ACKNOWLEDGMENT OF INDIVIDUAL.

State of.....
County of..... } *ss:*

Before me, a notary public, in and for said county and State, on this day of, 191.., personally appeared to me known to be the identical person who executed the within and foregoing instrument, and acknowledge to me that executed the same as free and voluntary act and deed for the uses and purposes therein set forth.

....., *Notary Public.*

(My commission expires)

ACKNOWLEDGMENT OF CORPORATION.

State of.....
County of..... } *ss:*

On this day of, A. D. 191.., before me, a within and for the and aforesaid, personally appeared and to me personally known, who, being by me duly sworn, did each say that is the president and is the secretary of, a corporation, and that the seal affixed to the foregoing and annexed instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said and duly acknowledged that they each had in their said official capacities executed the foregoing instrument as the act and deed of the said company for the consideration and purposes therein mentioned and set forth.

Witness my hand and official seal this day of, 191...

.....,

.....

(My commission expires)

REGULATIONS UNDER THE ACT OF JULY 17, 1914 (38 STAT., 509), PROVIDING FOR AGRICULTURAL ENTRIES ON PHOSPHATE, OIL AND CERTAIN OTHER MINERAL LANDS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 20, 1915.

REGISTERS AND RECEIVERS,
United States Land Offices.
(Exclusive of Alaska.)

SIRS: The folowing regulations are for the guidance of yourselves and the public in matters affected by the Act of Congress approved July 17, 1914 (38 Stat. at L. 509), entitled "An Act to provide for agricultural entry of lands withdrawn, classified or reported as containing phosphate, nitrate, potash, oil gas or asphaltic minerals."

SCOPE OF THE ACT.

(1) The legislation is general and comprehensive, and operates in all the States containing public lands of the character

specified. It does not apply to land in the Territory of Alaska, or to lands in the United States which for other reasons are not available or which, in other words, are not subject to entry. This statute fully covers the field included in the special Acts of August 24, 1912 (37 Stat. at L. 496), providing for certain agricultural entries and selections on oil and gas lands in the State of Utah, and of February 27, 1913 (37 Stat. at L. 687), authorizing selections by the State of Idaho of phosphate and oil lands in that State. This broad and general Act supersedes and displaces said special laws, and by implication works their repeal. Therefore, all entries, selections or locations of lands of the character described in those special statutes made in the States mentioned on or after date of this general Act (July 17, 1914) will be treated as within the scope of the latter act, and will be adjudicated thereunder. Also, all such entries, selections or locations made under those special Acts prior to, and not perfected at that date will be carried to completion, approved and patented, if at all, under the general Act.

(2) Section 1 of the Act authorizes the appropriation, location, selection, entry or purchase under the non-mineral land laws of the United States, if otherwise available, of lands withdrawn or classified as phosphate, nitrate, potash, oil, gas or asphaltic minerals, or which are valuable for such deposits, whenever such lands are sought with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn, classified or reported as valuable, together with the right to prospect for, mine and remove the same. Any form of appropriation under the proper applicable non-mineral land laws is authorized, with a reservation of the minerals as specified, to the same extent as if no withdrawal or classification had been made. The only exception is that no desert-land entry made under the Act shall contain more than 160 acres.

The term "person" used in this Act will be interpreted as covering a State (see *Ex parte,* Utah, 38 L. D. 245), or other corporation, or an association when duly qualified.

Under the proviso in section 2 of the Act applications for land, either withdrawn or classified, may be presented with a view of proving that the land applied for, if withdrawn, are

not of the character intended to be included in the withdrawal, or, if classified, if disproving the classification and securing patent free from reservation; also, claimants for lands withdrawn or classified for the specified minerals *subsequent* to location, selection, entry or purchase have the privilege of showing at any time before final entry, purchase or approval of selection or location that the lands sought are, in fact, non-mineral in character.

(3) This Act in many respects resembles that of March 3, 1909 (35 Stat. at L. 844), which provides for the protection of the surface rights of entrymen upon lands subsequently classified, claimed or reported as coal lands, and also, that of June 22, 1910 (36 Stat. at L. 583), authorizing certain forms of agricultural entries and selections on withdrawn or classified coal lands. The general instructions under these Acts of September 7, 1909 (38 L. D. 183); September 8, 1910 (39 L. D. 179); May 23, 1912 (41 L. D. 30); and June 14, 1912 (41 L. D. 89), may be followed, so far as applicable, in matters of practice and procedure not specifically covered by these regulations.

(4) Section 3 of the Act is both retrospective and prospective, and under it any person who, prior to the act, had applied, or who after the passage of the Act, shall apply for lands which are subsequently withdrawn, classified or reported as being valuable for the specified minerals, and which are otherwise available, may upon application therefor, and the making of satisfactory proof, receive a patent with a reservation. In this particular, the statute is quite similar to that of March 3, 1909, above referred to, and the disposition of such cases will follow the practice under that Act in so far as the same is applicable.

APPLICATIONS.

(5) All applications to locate, select, enter or purchase lands under this Act, before being accepted and filed by you, must have written, stamped or printed upon their face, the following: "Application made in accordance with, and subject to, the provisions and reservations of the Act of July 17, 1914 (38 Stat. at L. 509)."

Like notations will be made by registers upon the face of the notices of allowance issued on applications filed under this Act.

Orders of withdrawal under the reclamation act of lands withdrawn, classified, or reported as valuable for the specified minerals

with a view to passing title to the same in accordance with the terms of this Act, will state that such withdrawal is made in accordance with and subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. at L. 509).

FINAL CERTIFICATES AND PATENTS.

(6) Final certificates issued to non-mineral claimants under this Act will contain the following provision, which you will cause to be written or stamped thereon:

Patent to contain provisions, reservations, conditions, and limitations of the act of July 17, 1914 (38 Stat., 509).

There will be incorporated in patents issued to non-mineral claimants under this act the following:

Excepting and reserving, however, to the United States all the [deposit on account of which the lands are withdrawn, classified, or reported as valuable—phosphate, oil, or other mineral, as the case may be] in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the act of July 17, 1914 (38 Stat., 509).

NOTATION OF RECORDS.

(7) Upon the acceptance by you of any filing under this Act, you will make appropriate notation of your records to show that the filing was made under the provisions thereof; and upon the ascertainment (which will be noted of record) that the non-mineral locator, selector, entryman or purchaser whose filing falls within the provisions of section 3 of the Act, shall receive the limited patent prescribed therein, you will cause to be written or stamped on your tract books, in line with the notation of the entry and as near the description as practicable that the mineral deposits (phosphate, oil, etc., as the case may be) are reserved to the United States, act of July 17, 1914. You will make a similar notation on the margin of the township plat, giving description of the land in which the deposits have been reserved.

RESERVED MINERAL DEPOSITS.

(8) The Act provides that the deposits reserved in agricultural patents issued thereunder shall be "subject to disposal by

the United States only as shall be hereafter expressly directed by law." Although provisions are made in the act for the protection of the surface owner against damage to his crops and improvements on the land by reason of prospecting for, mining and removing such reserved mineral deposits, these provisions can have no operation or effect until further legislation by Congress shall authorize disposition of the reserved mineral deposits and define the qualifications of those who may acquire such deposits. In the meantime there is no right to prospect, and no right to acquire such deposits can be in any way initiated.

CLAIMANTS OF LANDS SUBSEQUENTLY WITHDRAWN.

(9) [As amended Apr. 28, 1916.] Non-mineral claimants who are or may be affected by withdrawals or classifications made, or which shall be made, subsequent to their locations, selections, entries or purchases, upon submission of satisfactory proof of compliance with the laws under which they claim, unless the withdrawal be revoked or the classification set aside prior to the issuance of patent, or unless they show that the lands embraced in their claims are in fact non-mineral, shall be entitled to the patent authorized to be issued by section 3 of the Act upon the filing of an application therefor. Such claimant will be notified of his right to such patent, and upon failure to file within 30 days his application therefor or to apply for a classification of the land as nonmineral, the entry will be canceled.

APPLICATIONS TO DISPROVE CLASSIFICATIONS.

(10) (*a*) The proviso to section 2 of the Act allows any qualified person to present an application to locate, select, enter or purchase, under the land laws of the United States, lands which are withdrawn or classified as phosphate, nitrate, potash, oil, gas or asphaltic minerals, with a view to obtaining a patent thereunder without reservation. An applicant under this proviso must submit with his application a request for a classification of the land as non-mineral, filing therewith a showing, preferably the sworn statements of experts or practical miners, of the facts upon which is founded the knowledge or belief that the land applied for is not valuable for the mineral on account of which it was withdrawn or classified.

Applications to locate, select, enter or purchase lands so withdrawn or classified, which are not filed under the provisions of section 1 of the Act, and are not accompanied by request for classification as non-mineral of the land applied for, and the evidence required herein to be filed with such request, will be rejected by you, and the applicant allowed 30 days from notice within which to amend his application to take a limited patent for the land in accordance with and subject to the provisions of the Act, or to file request for classification thereof as non-mineral, accompanied by the necessary evidence.

Such applications will be given proper serial numbers, noted upon your records, and forwarded, together with the request for classification and the evidence submitted therewith, to the General Land Office for action.

If upon the showing made, and such other inquiry as may be deemed proper, a restoration of the land, where withdrawn, be secured, or a reclassification as non-mineral be made, where the land has been classified, the non-mineral application, in the absence of other objection, will be returned for allowance.

If the application be denied you will be so notified, and the applicant may, within 30 days from notice of such denial, apply to your office for a hearing to disprove the classification. When a hearing is applied for, you will notify the chief of field division and proceed therewith under the Rules of Practice. If the applicant fail to apply for a hearing within the time allowed, the application to locate, select, enter or purchase will be finally rejected.

The rejection of the application, however, will not preclude the applicant from filing application to locate, select, enter or purchase the land in accordance with and subject to the provisions and reservations of said Act.

(*b*) Under this proviso, persons who have located, entered, selected or purchased lands subsequently withdrawn or classified as valuable for said mineral deposits, are allowed the privilege of showing, at any time before final entry, purchase or approval of selection or location, that the lands are in fact non-mineral in character.

Claimants to whom this provision is applicable may, therefore, file in the proper local land office application for a classification of the land as non-mineral, together with the evidence prescribed

herein to be filed by an original applicant with his request for classification, whereupon the same will be forwarded to the General Land Office for action. If as a result thereof the land be restored to entry, if withdrawn, or classified as non-mineral, if classified, you will be so informed, in order that you may note your records and advise the claimant. If the application be denied, you wil be advised thereof, and the claimant allowed 30 days from notice of such denial within which to make application to your office for a hearing to establish the non-mineral character of the land. When a hearing is applied for, you will notify the chief of field division and proceed therewith under the Rules of Practice.

BURDEN OF PROOF.

11. Where application is made to enter, locate or select lands withdrawn or classified as valuable for or on account of any of the minerals specified in this Act and in these regulations, the burden of proof to show that said lands are not of the character of those intended to be withdrawn, or that the classification as such was and is erroneous and improper in point of fact, will rest upon and be borne by the applicant in the event that he shall undertake to establish, at a hearing ordered and held for that purpose, the truth of the allegations made by him in that behalf.

A withdrawal or classification will be deemed *prima facie* evidence of the character of the land covered thereby for the purposes of this Act. Where any non-mineral application to select, locate, enter or purchase has *preceded* the withdrawal or classification and is incomplete and unperfected at such date, the claimant, not then having obtained a vested right in the land, must take patent with a reservation or sustain the burden of showing at a hearing, if one be ordered, that the land is in fact non-mineral in character and therefore erroneously classified or not of the character intended to be included in the withdrawal. Where the agricultural claimant has completed and perfected his claim and becomes possessed of a vested right in the land which *subsequent* thereto is withdrawn or classified, the burden will rest upon the Government to show that the land is in fact mineral in character and was so known at the date of final completion

and perfection of the claim. See Charles W. Pelham (39 L. D. 201).

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

INDIAN OIL AND GAS LANDS.

§ 1. The civilized tribes.—Alienation of lands.
§ 2. Leases.—Minors.
§ 3. Evidence of Indian blood.—Prior leases.
§ 4. Taxation of lands.
§ 5. Alienation or incumbrance of restricted lands.
§ 6. Minors' lands.—Probate Court of Oklahoma, authority.
§ 7. Contests.—Limitations.
§ 8. Wells of full blooded Indians.
§ 9. Allottees.—Death.—Distribution of estate.
§ 10. Choctaw and Chickasaw warrants.
§ 11. Seminole lands.—Royalties.
§ 12. Deposit on tribal allotment records.
§ 13. Tribal property.
§ 14. Town sites.

[Act of May 27, 1908, 35 Stat. at L. 312.]

CHAPTER 199.

AN ACT for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.

§ 1. The five civilized tribes.—Alienation of lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after sixty days from the date of this Act the status of the lands allotted hertofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or in cumbrance,[1] be as follows: All lands, including homesteads,

[1] Heckman v. U. S., 224 U. S. 417; Mullen v. U. S., 224 U. S. 448; Goat v. U. S., 224 U. S. 458; Deming Investment Co. v. U. S., 224 U. S. 471; Geo. W. Choate v. M. P. Trapp, 224 U. S. 665; Bell v. Cook, 192 Fed. 597; Henry Gas Co. v. U. S., 191 Fed. 132; Bettes v. Brower, 184 Fed. 342; U. S. v. Allen, 171 Fed. 907; 179 Fed. 13; same, 224 U. S. 413; Coody v. Coody, 136 Pac. 754; Jefferson v. Winkler, 110 Pac. 755; Gleason v. Wood,

of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning right of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an Act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

§ 2. Leases.—Minors.

Sec. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions

114 Pac. 703; Mellarry v. Eatman, 116 Pac. 935; Kirkpatrick v. Burgess, 116 Pac. 764; Yarbrough v. Spaulding, 123 Pac. 843; In re Davis' Estate, 122 Pac. 547; Simmons v. Mullen, 122 Pac. 518; Texas Co. v. Henry, 126 Pac. 224; United States v. Shock, 187 Fed. 870; Truskett v. Closser, 198 Fed. 835.

have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for period of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further,* That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.[1]

§ 3. Evidence of Indian blood.—Prior leases.

Sec. 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.[2]

That no oil, gas or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior as if this Act had not been passed: *Provided,* That the owner or owners of any allotted land from which restrictions are removed by this Act, or have been removed by previous Acts of Congress, or by the Secretary

[1] Jefferson v. Winkler, 110 Pac. 755; Kirkpatrick v. Burgess, 116 Pac. 764; Yarbrough v. Spaulding, 123 Pac. 843; In re Davis' Estate, 122 Pac. 547; Gill v. Haggarty, 122 Pac. 641; Bell v. Cook, 192 Fed. 597; Truskett v. Closser, 198 Fed. 835; Alluwe Oil Co. v. Shufflin, 124 Pac. 15; Barnsdall v. Owen, 200 Fed. 519.

[2] Yarbrough v. Spaulding, 123 Pac. 843; Rice v. Ruble, 134 Pac. 44; Rice v. Anderson, 134 Pac. 1120.

of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease therein agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situate.[1]

§ 4. Taxation of lands.

Sec. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided,* That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.[2]

§ 5. Alienation or incumbrance of restricted lands.

Sec. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.[3]

[1] Warren v. Canard, 120 Pac. 599; Williams v. Joins, 126 Pac. 1013; Campbell v. McSpadden, 127 Pac. 854; Bell v. Cook, 192 Fed. 497; Hegler v. Faulkner, 153 U. S. 107; Lawless v. Raddis, 129 Pac. 711.

[2] U. S. v. Shock, 187 Fed. 862; Id., 870; Gleason v. Wood, 114 Pac. 703; 224 U. S. 677; Choate v. Trapp, 224 U. S. 664; Alexander v. Rainey, 114 Pac. 710; Nelson v. Wood, 122 Pac. 1103; Whitmire v. Trapp, 126 Pac. 578; Weilip v. Audrain, 128 Pac. 254; Bell v. Cook, 192 Fed. 597; Truskett v. Closser, 198 Fed. 835; English v. Richardson, 224 U. S. 680.

[3] Groom v. Wright, 121 Pac. 215; Bell v. Cook, 192 Fed. 597; Casey v. Bingham, 132 Pac. 663.

§ 6. Minor's lands.—Probate Courts of Oklahoma, authority.

Sec. 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any

allottee having restricted land he shall, without charge, except the necesary court and recording fees and expenses if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

Supplemental to the funds appropriated and available for expenses connected with the affairs of the Five Civilized Tribes, there is hereby appropriated, for the salaries and expenses arising under this section, out of any funds in the Treasury not otherwise appropriated, the sum of ninety thousand dollars, to be available immediately, and until July first, nineteen hundred and nine, for expenditure under the direction of the Secretary of the Interior: *Provided,* That no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court, or otherwise.

And there is hereby further appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available and available until expended as the Attorney General may direct, the sum of fifty thousand dollars, to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the eastern judicial district of Oklahoma: *Provided,* That the sum of ten thousand dollars of the above amount, or so much thereof as may be necesary, may be expended in the prosecution of cases in the western judicial district of Oklahoma.

Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dismissed and the title quieted upon payment of the full balance due on the original appraisement of such lot: *Provided,* That such investigation must be concluded within six months after the passage of this Act.

Nothing in this Act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and

appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this Act.[1]

§ 7. Contests.—Limitations.

Sec. 7. That no contest shall be instituted after sixty days from the date of the selection of any allotment hereafter made, nor after ninety days from the approval of this Act in case of selections made prior thereto by or for any allottee of the Five Civilized Tribes, and, as early thereafter as practicable, deed or patent shall issue therefor.

§ 8. Wills of full-blood Indians.

Sec. 8. That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words "or a judge of a county court of the State of Oklahoma."[2]

§ 9. Allottees.—Death.—Distribution of Estates.

Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be

[1] U. S. v. Allen, 179 Fed. 13; 224 U. S. 413; Tirey v. Darneal, 133 Pac. 614; Jefferson v. Hinkler, 110 Pac. 755; MaHarry v. Eatman, 116 Pac. 935; Kirkpatrick v. Burgess, 116 Pac. 764; Dewalt v. Cline, 128 Pac. 121; Henry Gas Co. v. United States, 191 Fed. 132; Bell v. Cook, 192 Fed. 597; Truskett v. Closser, 198 Fed. 835.

[2] U. S. v. Shock, 187 Fed. 862; Proctor v. Harrison, 125 Pac. 479; Tiger v. Investment Co., 221 U. S. 286.

valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further,* That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further,* That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.[1]

§ 10. Choctaw and Chickasaw warrants.

Sec. 10. That the Secretary of the Interior is hereby authorized and directed to pay out of any moneys in the Treasury of the United States, belonging to the Choctaw or Chickasaw nations respectively, any and all outstanding general and school warrants duly signed by the auditor of public accounts of the Choctaw and Chickasaw nations, and drawn on the national treasurers thereof prior to January first, nineteen hundred and seven, with six percent interest per annum from the respective dates of said warrants: *Provided,* That said warrants be presented to the United States Indian agent at the Union Agency, Muskogee, Oklahoma, within sixty days from the passage of this Act, together with the affidavits of the respective holders of said warrants that they purchased the same in good faith for a

[1] Harris v. Gales, 188 Fed. 712; U. S. v. Shock, 187 Fed. 870; Lynde v. Brown, 97 Pac. 613; 27 Op. Atty. Genl., 530; U. S. v. Knight, 206 Fed. 145; Mullen v. Short, 133 Pac. 230; Gardner, County Judge, v. State, 110 Pac. 749; MaHarry v. Eatman, 116 Pac. 935; Stout v. Simpson, 124 Pac. 754; Tiger v. Western Investment Co., 221 U. S. 286.

valuable consideration, and had no reason to suspect fraud in the issuance of said warrants: *Provided further,* That such warrants remaining in the hands of the original payee shall be paid by said Secretary when it is shown that the services for which said warrants were issued were actually performed by said payee.

§ 11. Seminole lands.—Royalties.

Sec. 11. That all royalties arising on and after July first, nineteen hundred and eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided,* That the interest of the Seminole National in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight.

§ 12. Deposit an tribal allottment records.

Sec. 12. That all records pertaining to the allottment of lands of the Five Civilized Tribes shall be finally deposited in the office of the United States Indian agent, Union Agency, when and as the Secretary of the Interior shall determine such action shall be taken, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available as the Secretary of the Interior may direct, the sum of fifteen thousand dollars, or so much thereof as may be necesary to enable the Secretary of the Interior to furnish the various counties of the State of Oklahoma certified copies of such portions of said records as affect title to lands in the respective counties.

§ 13. Tribal property.

Sec. 13. That the second paragraph of section eleven of an Act entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended to read as follows:

That every officer, member or representative of the Five Civilized Tribes, respectively, or any other person having in his possession, custody or control, any money or other property, including the books, documents, records or any other papers, of any of said tribes, shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the tribe in his possession, custody or control and shall deliver all other tribal properties so held by him to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided, prior to July thirty-first, nineteen hundred and eight, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by fine of not exceeding five thousand dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe or tribes in interest for the amount or value of the money or property so withheld.

§ 14. Town sites.

Sec. 14. That the provisions of section thirteen of the Act of Congress approved April twenty-sixth, nineteen hundred and six (Thirty-fourth Statutes at Large, page one hundred and thirty-seven), shall not apply to town lots in town sites heretofore established, surveyed, platted and appraised under the direction of the Secretary of the Interior, but nothing herein contained shall be construed to authorize the conveyance of any interest in the coal or asphalt underlying said lots.

Approved, May 27, 1908.

LANDS ON INDIAN RESERVATIONS.

REGULATIONS GOVERNING THE LEASING OF TRIBAL LANDS FOR MINING PURPOSES.

The proviso of section 3 of the Act of Congress approved February 28, 1891 (26 Stat. L., 795), reads:

"That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for

farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

1. The lands authorized to be leased are lands occupied by Indians who have "bought and paid for the same;" "lands acquired by treaty, by the payment of money or exchange of, or surrender of, other property or possessions."

2. Lands withdrawn from the public domain by executive order, for the use of the Indians, are not subject to lease for mining purposes.

3. Selection of tribal lands for mining purposes must be made with the consent of the tribal council of the reservation, subject to the approval of the Secretary of the Interior.

4. If the Indians of a reservation wish to lease their surplus lands for mining purposes, the superintentent in charge of the reservation should submit the question to the Indian Office. The first step necessary to be taken, in case the surplus lands are subject to lease, is the authorization of the tribal council. Application should be made to the Commissioner of Indian Affairs for authority to negotiate with the tribe or tribes of the reservation for mining privileges.

5. Leases must be executed in quadruplicate and signed by the lessee and business council of the tribe or tribes, and submitted to the Indian Office for approval of the Secretary of the Interior.

6. The action of the council authorizing the leasing must be reduced to writing and properly signed and authenticated. A certified copy of so much of the council proceedings as relate thereto must be attached to each lease and made a part thereof.

7. The term of the lease shall not be for more than ten years.

8. Without special permission of the Secretary of the Interior, which may be obtained only when the conditions of mining or operation are very exceptional.

(A) No lease on deposits of the nature of lodes or veins, containing ores of gold, silver, copper, lead, zinc or other use-

ful metals, shall be granted for less than 20 acres, nor for more than 640 acres.

(B) No lease for beds of placer gold, gypsum, phosphate, asphaltum, iron ores, or other useful minerals other than coal, oil, and gas shall be granted for less than 40 acres, nor for more than 960 acres.

(C) No lease for coal, oil, or gas shall be granted for less than 40 acres, nor for more than 4,800 acres.

9. The area covered by a lease shall be in a reasonably compact body and shall conform to the system of the Public Land Surveys, except that leases covering lode ground may consist of one or more adjoining parallelograms 1,500 feet in length by 600 feet in width as provided for by the U. S. mining laws. No lease under these regulations shall convey extralateral rights, and no coal lease shall have a length exceeding one mile long the outcrop.

10. No person or association, and no association of which each member is not individually qualified, shall be permitted to hold an additional lease of any of the classes above enumerated, unless he is paying royalty on actual production on all of the leases of the same class he is then holding.

11. There shall be no limit to the number of producing leases any individual or company may hold, except that the maximum areas shall not exceed those specified in classes A, B and C of paragraph 8.

12. Each lessee shall file with the officer in charge of the reservation an annual report in duplicate within twenty days after the close of each calendar year, showing the character and value of the development work performed in that year, such report to be verified by affidavit of the lessee or his representative in charge of the work.

REGULATIONS GOVERNING THE LEASING OF INDIAN ALLOTTED LANDS FOR MINING PURPOSES.

A provision in the Act of March 3, 1909 (35 Stat. L., 781-783), reads:

"That all lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allotee be leased for mining purposes for any term of years as may be deemed advisable

by the Secretary of the Interior; and the Secretary of the Interior is hereby authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this paragraph into full force and effect."

1. Allotments of lands are regarded as made when approved by the Secretary of the Interior.

2. Application should be made to the Commissioner of Indian Affairs through the superintendent or other officer in charge of the reservation for authority to negotiate with individual allottees for mining privileges, and no application for mining leases will be considered by the Indian Office unless specific permission has first been granted by it for negotiating for such leases with the individual Indian allottees whose lands are sought to be leased, and a showing made as to character and financial ability of the applicant to carry on the work of mining.

3. Leases must be executed in quadruplicate and signed by the principals thereto, and submitted to the Indian Office for approval of the Secretary of the Interior.

The superintendent or other officer in charge of the reservation may act for minors in all lease matters, and also for allottees who are *non compos mentis*. Where the lessor is a minor the lease must show his age. No lease of a minor's land shall extend beyond minority, except that when several heirs own the land the lease may run until the majority of the youngest minor heir, not, however, to exceed twenty years.

4. The term of any lease shall not exceed twenty years from the date of the lease.

5. No individual, corporation, company or association shall hold under leases for mining purposes, Indian lands in any one State or Territory in excess of the following areas:

(A) On deposits of the nature of lodes or veins, containing ores of gold, silver, copper, lead, zinc, or other useful metals, nor more than 640 acres.

(B) For beds of placer gold, gypsum, asphaltum, phosphate, iron ores, or other useful minerals other than coal, oil, and gas not more than 960 acres.

(C) For coal, oil, or gas not more than 4,800 acres.

REGULATIONS APPLYING TO THE LEASING OF TRIBAL OR ALLOTTED LANDS FOR MINING PURPOSES.

1. Each lessee is required to furnish with each lease, to be filed at the time the lease is presented, a bond for $1,000, with two or more satisfactory securities or with a surety company duly authorized to execute bonds, and to increase such bond, on thirty days' notice, to a sum double the amount of royalty payable in any half period, whenever the royalty exceeds $500. This bond shall be for the payment of all rents and royalties and for the faithful carrying out of all other conditions of the lease and for the observance of existing regulations and of any regulations that may be hereafter made.

2. Lessees shall not assign their leases or any part therein or thereunder, or any part thereof, and shall not sublet the said premises or any part thereof without the consent in writing first obtained from the Secretary of the Interior, and the lessees shall not permit any person or persons to have possession of said premises or any part thereof, save and except those rightfully entitled thereto, pursuant to the conditions set forth in the law, regulations, and lease.

3. Any lease may be surrendered and canceled with the approval of the Secretary of the Interior, but all royalties, rentals, and other obligations due and accrued up to the date application for cancellation is made, must be paid and discharged before such application will be considered.

4. The rate royalty shall be subject to readjustment at the end of each five years at such equitable rate conforming to the prevailing commercial practice as the conditions at that time shall justify.

5. Lessees shall pay on each lease annually, in advance, a rent of fifteen cents per acre for the first year or fraction thereof, up to December 31; forty cents per acre for the second year, and seventy-five cents for the third and each succeeding year.

Under leases of Class A there shall be expended annually on development work, a sum which, with the annual rental, shall amount to not less than $5 per acre.

Under leases of Class B there shall be expended annually on development work, a sum which, with the annual rental shall

amount to not less than $100, for each lease of 160 acres or fraction thereof.

All sums paid as rental in any one year shall be credited after production begins on the royalty for that year.

6. For substances other than gold, silver, copper, lead, zinc, tungsten, coal, asphaltum and allied substances, oil and gas, the lessee shall pay quarterly a royalty of not less than 10 per cent. of the value, at the nearest shipping point, of all ores, metals, or mineral marketed.

7. For gold, silver, copper, lead, zinc and tungsten, the lessee shall pay quarterly a royalty of not less than 10 per cent. to be computed on the gross value of the ores as shown by reduction returns after deducting freight and treatment charges. Duplicate reduction returns shall be filed by the lessee with the superintendent or other officer in charge of the reservation from which the ores are taken, within twenty days after the reduction of the ores, and the royalties shall be paid to the superintendent or other officer in charge within ten days after the ending of the quarter within which such returns are made.

8. For coal, the lessee shall pay, quarterly, a royalty of not less than 10 cents per ton of 2,000 pounds, mine run, or coal as taken from the mine, including what is commonly called "slack."

9. For asphaltum and allied substances, the lessee shall pay, quarterly, a royalty of not less than 10 cents per ton of 2,000 pounds for crude material or 60 cents per ton for refined products.

10. For oil, the lessee shall pay a royalty of not less than 12½ per cent. of the gross proceeds of the oil procured, and payment shall be made at the time of sale or removal of oil from the premises where produced.

11. For gas, the lessee shall pay no less than $100 per year for each well. Where the lessee desires to retain the gas-producing privilege of any well but not to utilize the well for commercial purposes, he shall pay an annual rental of $50 in advance, beginning from the date of discovery of gas, and to be paid within thirty days therefrom.

12. The royalties on all products, except gas, coal, oil, gold, silver, lead, zinc, copper, and tungsten shall be based on sworn

quarterly reports, and shall be paid within twenty days after the close of each quarter.

13. The lessee shall keep books of account showing the amount of ore shipped, or oil or other mineral substances, sold, or treated, and showing also the amount of money received from the sale of ores, oil, etc. The books of the lessee shall be open to inspection, examination, and verification by any officer of the Interior Department assigned to such duty by the Secretary of the Interior, and it is distinctly understood that the duly authorized agents of the Government shall be permitted freely to make transcripts of all the accounts and other books of the lessee.

14. All royalties or payments due under leases issued under these regulations shall be paid to the superintendent or other officer in charge of the reservation in cash or by certified check, or other suitable form of exchange.

15. A duplicate of all mill and smelter returns shall be furnished the Government by the mill owner or owner of the smelter treating ore from any lease under these regulations, and duplicate returns of all pipe line runs of oil or other shipments shall also be furnished the Government and notice shall be given the superintendent or other officer in charge of the reservation that he may be present when oil is taken by pipe line companies or other purchasers. The lessee or his representative shall actually be present when oil is taken by such companies and the lessee shall be responsible for the correct measurment and report of oil so run and taken.

16. Lessees shall file quarterly reports, accompanied by maps and diagrams when necessary, within twenty days after the close of each quarter, with the officer in charge of the reservation and the Commissioner of Indian Affairs showing the extent, character, and location of all development work and mining operations, such quarterly reports to be in the form of sworn statements by the lessee or superintendent in charge of the work.

17. Lessees shall report discovery of oil and gas within ten days after said discovery.

18. In mining operations the lessees shall keep the mine well and sufficiently timbered at all points where necessary in accordance with good mining practice, and in such manner

as may be necessary to the proper preservation of the property leased, and safety of the workmen, compatible with economical mining.

19. On expiration of the term of a lease, or when a lease is surrendered, the lessee shall deliver to the lessor the leased ground with the mine workings in good order and condition and bondsmen will be held for such delivery in good order and condition, unless relieved by the Secretary of the Interior for cause. It shall, however, be stipulated that the machinery necessary to operate the mine is the property of the lessee, but that it may be removed by him only after the condition of the property has been ascertained by inspection by the Secretary of the Interior or his authorized agents.

20. To prevent waste, each lease for oil or gas will contain a covenant that the lessee will, in a practical and workmanlike manner, plug all dry and abandoned wells at a proper depth or depths in a manner satisfactory to the Secretary of the Interior, or his authorized agents, that the lessee will further prevent the waste of oil or gas, and that if he fails to stop such waste or plug such dry or abandoned wells, the Secretary of the Interior may cause these acts to be performed at the expense of the lessee or his bondsmen, with or without cancellation of lease, as he may deem wise, and lessees are not permitted to locate either tanks or wells within less than 200 feet of the boundary line of the land covered by his lease nor of any building used as a dwelling, granary, or shelter for stock, except where actually necessary to offset wells upon adjoining tracts. Lessees may be required to drill and operate wells to offset producing wells on adjoining tracts within 200 feet of the dividing line.

21. It is expressly stipulated that any duly authorized agent of the Government shall be permitted from time to time, and at all times during the life of the lease, freely and without notice to enter upon and in all parts of the leased premises, and, if desired, take with him the local mine inspector and such mining experts as may be necessary for the purpose of inspection and examination thereof, with a view of ascertaining whether or not the terms and conditions of the agreement are being faithfully complied with, and to know that the mine is operated in workmanlike manner as required by the

lease, and in compliance with the law of the State or Territory in which the mine is situated.

22. The Secretary of the Interior may, in his discretion, cancel any lease, if the mining operations are conducted wastefully and without regard to good mining practice.

Failure to faithfully observe and perform any obligation arising out of or under the provisions of these regulations, shall subject the lease to cancellation at the discretion of the Secretary of the Interior, and on the violation of any of the conditions, covenants, and agreements made with the Government and allottee by the lessee, the lease at the option of the Secretary of the Interior shall expire, and the Government agents, employees and representatives may, without notice or demand, enter upon the leased premises or any part thereof, and dispossess the lessee, his employees, agents and representatives and all persons occupying the same, with or without force, and with or without process of law, and without prejudice to any other lawful remedy or remedies.

OIL AND GAS ON STOCK-RAISING HOMESTEADS.

[A statute of Congress, approved December 29, 1916, provides for the entry of lands, too poor for crop-raising, for stock-raising, see § 350. The only provision of that Act of interest to us in this connection is section 9, which is set out below, with rules and regulations of the General Land Office, and a form of bond to be given.]

Sec. 9. That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this act, for the purpose of prospecting for coal or other minerals

therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided,* That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this Act with reference to the disposition, occupancy, and use of the land as permitted to an entryman under this Act.

Approved December 29, 1916.

REGULATIONS ON DISPOSAL OF COAL AND OTHER MINERAL DEPOSITS.

14. (a) Section 9 of this Act provides that all entries made and patents issued under its provisions shall contain a reservation to the United States of all coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine and remove the same; also that the coal and

other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

Said section 9 also provides that any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented under the act, for the purpose of prospecting for the coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on the land by reason of such prospecting.

It is further provided in said section 9 that any person *who has acquired from the United States the coal or other mineral deposits in any such land* or the right to mine and remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; or, second, upon payment of the damages to crops or other tangible improvements to the owner thereof under agreement as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon. This bond, the form whereof will be found printed in the appendix hereto, must be executed by the person who has acquired from the United States the coal or other mineral deposits reserved, as directed in said section 9, as principal, with two competent individual sureties, or a bonding company which has complied with the requirements of the Act of August 13, 1894 (28 Stat. at L. 270), as amended by the Act of March 23, 1910 (36 Stat. at L. 241), and must be in the sum of not less than $1,000. Qualified corporate sureties are preferred and may be accepted as sole surety. Except in the case of a bond given by

a qualified corporate surety there must be filed therewith affidavits of justification by the sureties and a certificate by a judge or clerk of a court of record, a United States district attorney, a United States commissioner, or a United States postmaster as to the identity, signatures, and financial competency of the sureties. Said bond, with accompanying papers, must be filed with the register and receiver of the local land office of the district wherein the land is situate, and there must also be filed with such bond evidence of service of a copy of the bond upon the homestead entryman or owner of the land.

If at the expiration of 30 days after receipt of the aforesaid copy of the bond by the entryman or owner of the land no objections are made by such entryman or owner of the land and filed with the register and receiver against the approval of the bond by them, they may, if all else be regular, approve said bond. If, however, after receipt by the homestead entryman or owner of the lands of copy of the bond, such homestead entryman or owner of the land timely objects to the approval of the bond by said local officers, they will immediately give consideration to said bond, accompanying papers, and objections filed as aforesaid to the approval of the bond, and if, in consequence of such consideration by them, they shall find and conclude that the proffered bond ought not to be by them approved, they will render decision accordingly and give due notice thereof to the person proffering the bond, at the same time advising such person of his right of appeal to the Commissioner of the General Land Office from their action in disapproving the bond so filed and proffered. If, however, said local officers, after full and complete examination and consideration of all the papers filed, are of the opinion that the proffered bond is a good and sufficient one and that the objections interposed as provided herein against the approval thereof by them do not set forth sufficient reasons to justify them in refusing to approve said proffered bond, they will, in writing, duly notify the homestead entryman or owner of the land of their decision in this regard and allow such homestead entryman or owner of the land 30 days in which to appeal to the Commission of the General Land Office. If appeal from the adverse decision of the register and receiver be not timely filed by the person proffering the bond, the local officers will indorse upon the bond "disapproved" and

other appropriate notations, and close the case. If, on the other hand, the homestead entryman or owner of the lands fails to timely appeal from the decision of the register and receiver adverse to the contentions of said homestead entryman or owner of the lands, said register and receiver may, if all else be regular, approve the bond.

Mineral applications and coal declaratory statements for and applications to purchase the coal or other mineral deposits in lands entered or patented under the Act, reserved as provided in the Act, will, if all else be regular, be received and filed at any time after the homestead entry has been received and allowed of record: *Provided,* That the lands or the coal or other mineral deposits therein are not at the time withdrawn or reserved from disposition.

(*b*) Every application to make homestead entry under this Act must contain a statement to the effect that the entry is made subject to a reservation to the United States of all the coal and other minerals in the land, together with the right to prospect for, mine and remove the same. (See Forms 4-016 and 4-016a, Appendix.) The face of final certificates issued on every homestead entry made under the provisions of this Act must bear the following:

Patent to contain reservation of coal and other minerals, and conditions and limitations as provided by act of December 29, 1916 (Public, 290).

There will be incorporated in patents issued on homestead entries under this Act the following:

Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove all the coal and other minerals from the same upon compliance with the conditions, and subject to the provisions and limitations, of the act of December 29, 1916 (Public, 290).

Mineral applications and coal-declaratory statements, applications to purchase, certificates and patents issued subject to the provisions of this Act for the reserved deposits will describe the coal or other mineral according to legal subdivisions or by official mineral survey, as the case may be, and payment will be made at the price fixed for the whole acreage.

Mineral applications and coal-declaratory statements and applications under the coal and mining laws for the reserved deposits disposable under the Act must bear on the face of the

same, before being signed by the declarant or applicant and presented to you, the following notation:

Patent shall contain appropriate notations declaring same subject to the provisions of the act of December 29, 1916 (Public, 290), with reference to disposition, occupancy, and use of the land as permitted to an entryman under said act.

Like notation will be made by the register and receiver on final certificates issued by them for the reserved mineral deposits disposable under and subject to the provisions of this Act.

FORM OF BOND FOR MINERAL CLAIMANTS.

4-684.

[Form approved by the Secretary of the Interior Jan. 18, 1917.]

Know all men by these presents; That I, ... (Give full names of principal of, ... County, ... (or we, ..., of, ... and sureties, and address of each.) County, ..., and, of, ... County, ... as the case may be), a citizen (or citizens) of the United States, or having declared my (or our) intention to become a citizen (or citizens) of the United States, as principal (or principals), and, of, ... county, ..., and of, ... county, ..., as sureties, are held and firmly bound unto the United States of America, for the use and benefit of the hereinafter-mentioned entryman or owner of the hereinafter-described land, whereof homestead entry has been made subject to the act of December 29, 1916, Public 290, in the sum of dollars ($.....), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors, and assigns, and each and every one of us and them, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this day of, 19..

The condition of this obligation is such that, whereas the above-bounden has acquired from the United States deposits (together with the right to mine and remove the same) situate, lying, and being within the of sec., township, range, ... land district, ..., and whereas homestead entry, serial No. has been made at land office, of the surface of the said above-described land, under the provisions of said act of December 29, 1916.

Now, therefore, if the above-bounden parties or either of them or the heirs of either of them, their executors or administrators, upon demand, shall make good and sufficient recompense, satisfaction, and payment, unto the said entryman or owner, his heirs, executors, or administrators, or assigns, for all damages to the entryman's or owner's crops or tangible improvements upon said homesteaded land as the said entryman or owner shall suffer or sustain or a court of competent jurisdiction may determine

and fix in an action brought on this bond or undertaking, by reason of the above-bounden principal's mining and removing of the deposits from said described land, or occupancy or use of said surface as permitted to said above-bounden principal under the provisions of said act of December 29, 1916, then this obligation shall be null and void; otherwise and in default of a full and complete compliance with either or any of said obligations, the same shall remain in full force and effect.

Signed and sealed in the presence of and witnessed by the undersigned:

.....
Principal.
(The principal should sign first.)

.....
Surety.
Residence..... Residence.....

.....
Surety.
Residence..... Residence.....

(Witnesses should give full names and addresses of each.)

(The principal and sureties should each sign full names and attach seals.)

WEST VIRGINIA.

PROTECTION OF OIL OR GAS WELLS.

§ 1. Casing.
§ 2. Closing wells or abandoning or ceasing operation.
§ 3. Preventing waste of gas.
§ 4. Rights of adjacent owner or operator.
§ 5. Definitions.
§ 6. Penalties.
§ 7. Jurisdiction of Circuit Court.—Restraining waste.

[Code of West Virginia, 1906.]

§ 1. Casing.

That when any well shall be drilled for the production of petroleum oil, natural gas, salt water or mineral water, it shall be the duty of the owner thereof, before drilling said well into the oil and gas sand, to encase such well with good and sufficient wrought iron, steel or metal casing in such manner as to exclude and shut out all surface water, or fresh water, and to prevent the same from reaching or penetrating said oil and gas sand. (Acts 1891, c. 106; Act 1897, c. 58.)

§ 2. Closing wells or abandoning or ceasing operation.

It shall be the duty of the owner of any well drilled for any of the purposes mentioned in the first section of this Act, before abandoning or ceasing to operate the same and before drawing the casing therefrom, to fill up the well with sand or rock sediment to a depth of at least fifty feet from the top of the oil or gas-bearing sand or rock, and drive a round, seasoned wooden plug, at least three feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing, and immediately after withdrawing the casing, except in regions where the well caves after the withdrawal of the casing, shall drive a round, seasoned wooden plug at a point just below where the lower end of the casing rested; which plug shall be at least three feet in length, tapering in form, and of the same diameter at the distance of 18 inches from the smaller end, as the diameter of the hole below the point at which it is to be driven. After the plug has been properly driven there shall be filled in on the top of the same, sand or rock sediment to the depth of at least fifty feet above the top of the oil or gas-bearing sand or rock.

§ 3. Preventing waste of gas.

It shall be the duty of any owner of any well producing gas, to prevent the waste of said gas by escape, and within the time hereinafter limited, to shut in and confine the same in said well or in the pipes or pipe lines connected therewith. Said gas with respect to any well heretofore drilled shall be so shut in within ninety days after the approval of this Act, and with respect to any well hereafter drilled or completed, shall be shut in within ninety days after the said well shall reach the lowest oil and gas sand defined or recognized in the gas or oil district in which said well is situated; but if any such well in the course of drilling shall pass through any oil and gas sand which produces gas above the said last or lowest oil and gas sand, then the drilling of said well to the last or lowest oil and gas sand shall be prosecuted with reasonable diligence, so that any waste of gas from the said upper sand shall not continue longer than shall be reasonably necessary:

Provided, however, That this section of this Act shall not apply to any well producing both oil and gas from the same sand, or to any well while it is being operated as an oil well. (Acts 1891, c. 106; Acts 1897, c. 58.)

§ 4. Rights of adjacent owner or operator.

If the owner of any such well shall neglect or refuse to cause said well to be plugged or shut in pursuant to the provisions of the second and third sections of this Act for a period of twenty days after a written notice so to do (which notice may be served personally upon any such owner, or may be posted in a conspicuous place at or near the well), it shall be lawful for the owner or operator of any adjacent or neighboring lands to enter upon the premises, where said well is situated and to cause the same to be plugged if it be an abandoned well, or shut in if it be not abandoned, pursuant to the provisions hereof; and the reasonable cost and expense incurred in so doing shall be paid by the owner of said well, and may be recovered as debts of like amount are by law recoverable. (Acts 1891, c. 106; Acts 1897, c. 58.)

§ 5. Definitions.

The term "owner," as herein used, with reference to any well, shall mean and include each and every person, persons, co-partnership, partnership, association or corporation owning, managing, operating, controlling or possessing said well as principal or principals, or as lessees, contractors, employees, or agents of such principal or principals; and the terms "oil and gas sand," or "sand," as herein used, shall mean and include any bed, seam, or stratum of rock or other material which produces, yields, or contains in quantity sufficient to be utilized, petroleum oil and natural gas or either of them. (Act 1891, c. 106; Act 1897, c. 58.)

§ 6. Penalties.

Any person or persons, co-partnership, partnership, association or corporation violating any of the provisions of this Act shall be liable to a penalty of one hundred dollars, to be

recovered with costs of suit in a civil action to be brought in the name of the State of West Virginia, in any circuit court, and such action may be brought at the instance and upon the relation of any citizen of the State. (Acts 1891, c. 106; Acts 1897, c. 58.)

§ 7. Jurisdiction of circuit courts.—Restraining waste.

Aside from and in addition to the imposition of any penalties under this Act, it shall be the duty of any circuit court in the exercise of its equitable jurisdiction, to hear and determine any bill or bills in equity which may be filed to restrain the waste of natural gas in violation of this Act, and to grant relief by injunction or by other decrees or orders, in accordance with the principle and practice of equity. The plaintiff in such bill shall have sufficient standing to maintain the same if he shall aver and prove that he is interested in the lands situated within the distance of one mile from said well, either as owner of such land in fee simple, or as an owner of leases thereof or of rights therein for the production of oil and gas, or either of them. (Acts 1891, c. 106; Acts 1897, c. 58.)

OIL LEASES.

§ 1. Statute of limitations.

That any person or persons, in presumable possession of land, claiming title under a lease of the same for the purpose of operating for oil or minerals, and who may have continuously remained in possession for the space of three years, and have bored for, and in good faith expended money in such boring and operating, shall be entitled to plead such facts in law, and said facts shall be a bar to any action at law or in equity, instituted to establish title to recover possession of said lease, or to recover the profits received therefrom: *Provided,* That nothing in this Act contained shall be so construed as to authorize a tenant to set up as a bar to a recovery an adverse possession against his landlord, and that this Act shall not affect any suit brought within twelve months after the passage of this Act. (Acts 1872-3, c. 61; Code 1906, § 3498.)

EMINENT DOMAIN.

Under the chapter (Code 1906, §§ 2207 to 2229), concerning the acquisition of lands by corporations for rights of way, occurs this section:

§ 29. Corporations for transportation of natural gas, water, etc.

That a company organized for the purpose of transporting natural gas, petroleum or water, necessary for use in carrying out the provisions of this Act in piping and transporting natural gas and petroleum or for boring for the same, through tubing and pipes, may enter upon any land for the purpose of examining and surveying a line for its tubing and pipes, and may appropriate so much thereof as may be deemed necessary for the laying down of such tubing and piping, and for the erection of tanks and the location of stations along such line, and the erection of such buildings as may be necessary for the purpose aforesaid; such appropriations shall be made and conducted in accordance with the law providing for compensation to the owners of private property taken for public use: *Provided*, That no dwelling-house, yard or garden, shall be taken for such purpose, nor shall any oil tank, gas or oil pipe line be erected or laid within 100 feet of any occupied dwelling-house without the consent of the owner thereof. And so far as the rights of the public therein are concerned, the county commissioners, as to public roads, and the council of any municipal corporation, as to streets and alleys, in their respective jurisdiction may subject to such regulations and restrictions as they may prescribe, grant to such company the right to lay such tubing and piping therein: *Provided, however*, The right to appropriate for any of the purposes herein above specified shall not include or extend to the erection of any tank, station or building, or lands thereof, or to more than one continuous line of pipe or tubing, or land therefor, in or through a municipal corporation without the council first consents thereto; and all excavations shall be well filled by such company and so kept by it, in all cases. Such company shall, for the purpose of transporting natural gas, oils and water, be

considered and held to be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this State. (Acts 1891, c. 113.)

NOTE.—By Act 1882, ch. 96 (Code 1906, § 2232), a mining, manufacturing, oil, salt or internal improvement company, may lay out a town not to include more than 640 acres, at or near their works, and sell lots therein. Under Acts 1883, ch. 58 (Code 1906, § 2292), companies may be formed for the transportation of "oil or other fluids."

TRANSPORTATION OF PETROLEUM OR OTHER OILS OR LIQUIDS.

[Taken from Code of 1906, §§ 2829 to 2851.]

§2829. Persons and companies subject to provisions of Act.
§2830. Duty to receive for transportation.—Connections with tanks or receptacles.—Delivery.
§2831. Inspection.—Grading and measurement before transportation.—Receipts.—Deductions for waste.
§2832. Charge for transportation.
§2833. Charge for storage.
§2834. Inspection and measurement before transportation.—Receipts.—Contents.—Deductions for waste.—Delivery.—Liability for loss.
§2835. Charge for transportation and delivery.
§2836. Same.—Time for commencement of charge.—Deductions for waste and evaporation.
§2837. Discrimination prohibited.
§2838. Penalties.—Damages for excessive charges.
§2839. Lien for charges.
§2840. Negotiability of accepted orders and certificates.
§2841. Receipts, certificates, etc.—Unauthorized issuance.—Duplicates.—Surrender.—Loss.—Cancellation.
§2842. Sale, incumbrance, etc., without consent of owner.
§2843. Monthly statements.
§2844. Same.—Specifications of amounts.—Duty to keep on hand oil equal to aggregate outstanding receipts, etc.
§2845. Penalties for unauthorized issuance of receipts, etc.
§2846. Penalties for unauthorized sales, incumbrances, etc.
§2847. Penalties for failure to make reports.
§2848. Examination of companies.
§2849. Offenses by examiners.
§2850. Same.—Refusal to furnish information, etc.—Penalties.
§2851. Repeal.

§ 2829. Persons and companies subject to provisions of Act.

1. Every person, corporation or company now engaged, or who shall hereafter engage or continue in the business of

transporting or storing petroleum, by means of pipe line or lines or storage by tanks, shall be subject to the provisions of this Act and shall conduct such business in conformity herewith; and the word "company" whenever used in this Act shall be construed to include persons and corporations. (Acts 1879, c. 27; Acts 1891, c. 44.)

§ 2830. Duty to receive for transportation.—Connections with tanks or receptacles.—Delivery.

2. Any company heretofore or hereafter organized for the purpose of transporting petroleum or other oils or liquids by means of pipe line or lines, shall be required to accept all petroleum offered to it in merchantable order in quantities of not less than two thousand gallons at the wells where the same is produced, making at its own expense all necessary connections with the tanks or receptacles containing such petroleum, and to transport and deliver the same at any delivery station, within or without the State, on the route of its line of pipes which may be designated by the owners of the petroleum so offered. (Acts 1870, c. 27; Acts 1891, c. 44.)

§ 2831. Inspection.—Grading and measurement before transportation.—Receipts.—Deductions for waste.

3. All petroleum of a gravity of thirty-five degrees Beaume or under, at a temperature of sixty degrees Fahrenheit, offered for transportation by means of pipe line or lines, shall, before the same is transported, as provided by section 2 of this Act, be inspected, graded and measured at the expense of the pipe line company, and the company accepting the same for transportation shall give to the owner thereof a receipt stating therein the number of barrels or gallons so received, and the grade, gravity and measurement thereof, and within a reasonable time thereafter, upon demand of said owner or his assigns, shall deliver to him at the point of delivery a like quantity and grade or gravity of petroleum in merchantable condition as specified in said receipt; except that the company may deduct for waste one per centum of the amount of petroleum specified in such receipt. (Acts 1879, c. 27; Acts 1891, c. 44.)

§ 2832. Charge for transportation.

4. The charge for receiving, transporting and delivering petroleum of the gravity of thirty-five degrees Baume or under, at a temperature of sixty degrees Fahrenheit, by means of pipe line or lines shall not exceed one cent per barrel of forty-two gallons per mile; Provided, That if said rate should amount for the whole distance transported to less than ten cents per barrel, then the sum of ten cents per barrel may be charged; and, provided, that if the distance be over twenty miles and not more than thirty miles, one-half cent per barrel may be charged for every mile over twenty miles; and provided, further, that if the distance be over thirty miles, the maximum charge shall not exceed twenty-five cents. (Acts 1879, c. 27; Acts 1891, c. 44.)

§ 2833. Charge for storage.

5. Any company engaged in storing petroleum of a gravity of thirty-five degrees Baume or under, at a temperature of sixty degrees Fahrenheit, by means of tanks, shall be permitted to charge for storage one cent per barrel per month or part of a month, unless the same is removed within fifteen days from the date when said oil is received into the custody of such company, and shall be allowed for evaporation and waste one-half of one per centum of the oil per month unless removed within thirty days from the date of the receipt of such petroleum; but no company engaged in the business of storing petroleum of the gravity of thirty-five degrees Baume or under, at a temperature of sixty degrees Fahrenheit, shall charge for storage any amount in excess of that authorized by this section. (Acts 1879, c. 27; Acts 1891, c. 44.)

§ 2834. Inspection and measurement before transportation.—Receipts.—Contents.—Deductions for waste.—Delivery.—Liability for loss.

6. All petroleum of a gravity exceeding thirty-five degrees Baume at a temperature of sixty degrees Fahrenheit, offered for transportation by means of pipe line or lines, shall be inspected and measured at the expense of the company trans-

porting the same, before the same is transported; and the company accepting the same for transportation, shall give to the owner thereof, or to the person in charge of the well or wells from which such petroleum has been produced and run, a ticket signed by its gauger, stating the number of feet and inches of petroleum which were in the tank or receptacle containing the same before the company began to run the contents of said tank, and the number of feet and inches of petroleum which remained in the tank after said run was completed; and all deductions made for water, sediment or the like, shall be made at the time such petroleum is measured; and within reasonable time thereafter said company shall, upon demand, deliver from the petroleum in its custody to the owner thereof, or to his assignee, at such delivery station on the route of its line of pipes as he may elect, a quantity of merchantable petroleum, equal to the quantity of petroleum run from said tank, or receptacle, which shall be ascertained by computation; except that the said company transporting said petroleum may deduct for evaporation and waste two per centum of the amount of petroleum so run, as shown by said run ticket; and except that in case of loss of any petroleum while in the custody of said company caused by fire, lightning, storm or other like unavoidable cause, such loss shall be born pro rata by all the owners of such petroleum at the time thereof. But said company shall be liable for all petroleum that is lost while in its custody by the bursting of pipes or tanks, or by leakage from pipe or tanks; and it shall also be liable for all petroleum lost from tanks at the wells where produced before the same has been received for transportation, if such loss be due to faulty connections made to said tanks; and said company shall be liable for all petroleum lost by the overflow of any tanks with which pipe line connections have been made, if such overflow be due to the negligence of such company; and for all the petroleum lost by the overflow of tanks with which pipe line connections should have been made under the provisions of this Act, but were not so made by reason of negligence or delay on the part of said company. (Acts 1879, c. 27; Acts 1891, c. 44.)

§ 2835. Charge for transportation and delivery.

7. Any company engaged in transporting petroleum of a gravity exceeding thirty-five degrees Baume at a temperature of sixty degrees Fahrenheit, by means of pipe line or lines, may charge for receiving, transporting and delivering such petroleum not to exceed twenty cents per barrel for each barrel of forty-two gallons: Provided, however, if where the point of delivery is without this State, more than twenty cents per barrel be charged, then there shall be charged no greater sum than ten cents per barrel for receiving such oil and transporting the same that part of the distance which is within this State. (Acts 1891, c. 44.)

§ 2836. Same.—Time for commencement of charge.—Deductions for waste and evaporation.

8. Any company engaged in transporting or storing petroleum of a gravity exceeding thirty-five degrees Baume at a temperature of sixty degrees Fahrenheit, by means of pipe line or lines and tanks, shall make no charge for storing said petroleum until after the expiration of the month following that in which the oil was run and received into custody. But it may charge for storing said petroleum of a gravity exceeding thirty-five degrees Baume at a temperature of sixty degrees Fahrenheit, or every day after the expiration of the month following that in which said oil shall have been run and received into custody, not to exceed one-fortieth of one cent per barrel of forty-two gallons for each day thereafter said oil shall continue to remain in its custody. Any such company shall make no charge for water, sediment, waste and the like in transporting or storing any petroleum after the same has been gauged or measured, before the run of same is made, except the two per centum for waste and evaporation hereinbefore mentioned. (Acts 1891, c. 44.)

§ 2837. Discrimination prohibited.

9. No company engaged in transporting or storing petroleum by means of pipe line or lines and tanks shall charge, demand or receive from any corporation, company, association, person or persons a greater or less rate for the trans-

portation or storage of petroleum than it charges, receives or demands from any other corporation, company, association, person or persons for the transportation or storage of petroleum of like gravity; and any shift, device or subterfuge made or attempted for the purpose of avoiding the provisions of this section shall be void. (Acts 1879, c. 27; Acts 1891, c. 44.)

§ 2838. Penalties.—Damages for excessive charges.

10. Any company, its officers or agents, willfully violating any of the provisions of sections two, three, four, five, six, seven, eight or nine, of this Act, or charging for any of the services provided for in any of said sections, an amount in excess of that authorized by said sections, shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars, nor more than one thousand dollars, and shall moreover be liable to the party aggrieved for all damages sustained by him by reason of such excessive charges. (Acts 1891, c. 44.)

§ 2839. Lien for charges.

11. Any company engaged in transporting or storing petroleum, shall have a lien upon said petroleum until all charges for transportation and storing said petroleum are paid. (Acts 1879, c. 27; Acts 1891, c. 44.)

§ 2840. Negotiability of accepted orders and certificates.

12. Accepted orders and certificates for petroleum, issued by any company engaged in the business of transporting and storing petroleum in this State, by means of pipe line or lines and tanks, shall be negotiable, and may be transferred by endorsement, either in blank or to the order of another, and any person to whom the said accepted orders and certificates shall be so transferred, shall be deemed and taken to be the owner of the petroleum therein specified. (Acts 1879, c. 27; Acts 1891, c. 44.)

§ 2841. Receipts, certificates, etc.—Unauthorized issuance.—Duplicates.—Surrender.—Loss.—Cancellation.

13. No receipt, certificate, accepted order or other voucher, shall be issued or put in circulation, nor shall any order be

accepted or liability incurred for the delivery of any petroleum, crude or refined, unless the amount of such petroleum represented in or by such receipt, certificate, accepted order, or other voucher or liability, shall have been actually received by and shall then be in the tanks and lines, custody and control of, the company issuing or putting in circulation such receipt, certificate, accepted order or voucher, or written evidence of liability. No duplicate receipt, certificate, accepted order or other voucher shall be issued or put in circulation, or any liability incurred for any petroleum, crude or refined, while any former liability remains in force, or any former receipt, certificate, accepted order or other voucher shall be outstanding and uncancelled, except such original paper shall have been lost, in which case a duplicate plainly marked "duplicate" upon the face, and dated and numbered as the lost original was dated and numbered, may be issued. No receipt, voucher, accepted order, certificate or written evidence of liability of such company on which petroleum, crude or refined, has been delivered, shall be re-issued, used or put in circulation. No petroleum, crude or refined, for which a receipt, voucher, accepted order, certificate or liability incurred, shall have been issued or put in circulation, shall be delivered, except upon the surrender of the receipt, voucher, order or liability representing such petroleum, except upon affidavit of loss of such instrument made by the former holder thereof. No duplicate receipt, certificate, voucher, accepted order or other evidence of liability, shall be made, issued or put in circulation until after notice of the loss of the original, and of the intention to apply for a duplicate thereof, shall have been given by advertisement over the signature of the owner thereof in at least four successive issues of a daily or weekly newspaper published in the county where such duplicate is to be issued. Every receipt, voucher, accepted order, certificate or evidence of liability, when surrendered, or the petroleum represented thereby delivered, shall be immediately cancelled by stamping and punching the same across the face in large and legible letters with the word "cancelled," and giving the date of such cancellation; and it shall then be filed and preserved in the principal office of such company for the period of six years. (Acts 1879, c. 27; Acts 1891, c. 44.)

§ 2842. Sale, incumbrance, etc., without consent of owner.

14. No company, its officers or agents, or any person or persons engaged in the transportation or storage of petroleum, crude or refined, shall sell or encumber, ship, transfer, or in any manner remove or procure or permit to be sold, encumbered, shipped, transferred, or in any manner removed from the tanks or pipes of said company engaged in the business aforesaid, any petroleum, crude or refined, without the written order of the owner or owners thereof. (Acts 1891, c. 44.)

§ 2843. Monthly statements.

15. Every company now or hereafter engaged in the business of transporting by pipe lines, or storing crude or refined petroleum in this State, shall, on or before the tenth day of each month, make or cause to be made and posted in its principal business office in this State in an accessible and convenient place for the examination thereof by any person desiring such examination, and shall keep so posted continuously until the next succeeding statement is so posted, a statement plainly written or printed, signed by the officer, agent, person or persons having charge of the pipes and tanks of said company, and also by the officer or officers, person or persons, having charge of the books and accounts thereof, which statement shall show in legible and intelligent form the following details of the business:

First.—How much petroleum, crude or refined, was in the actual and immediate custody of such company at the beginning and close of the previous month, and where the same was located or held; describing in detail the location and designation of each tank or place of deposit, and the name of its owner.

Second.—How much petroleum, crude or refined, was received by such company during the previous month.

Third.—How much petroleum, crude or refined, was delivered by such company during the previous month.

Fourth.—For how much petroleum, crude or refined, such company was liable for the delivery or custody of to other corporations, companies or persons at the close of the month.

Fifth.—How much of such liability was represented by outstanding receipts or certificates, accepted order or other vouchers, and how much was represented by credit balances.

Sixth.—That all the provisions of this Act have been faithfully observed and obeyed during the said previous month.

The statement so required to be made shall also be sworn to by said officers, agent, person or persons before some officer authorized by law to administer oaths, which oath shall be in writing, and shall assert the familiarity and acquaintance of the deponent with the business and condition of such company, and with the facts sworn to, and that the statements made in the said report are true. (Acts 1891, c. 44.)

§ 2844. Same.—Specifications of amounts.—Duty to keep on hand oil equal to aggregate outstanding receipts, etc.

16. All amounts in the statements required by this Act, when the petroleum is handled in bulk, shall be given in barrels and hundredths of barrels reckoning forty-two gallons to each barrel, and when such petroleum is handled in barrels or packages, the number of such barrels or packages shall be given, and such statements shall distinguish between crude and refined petroleum, and give the amount of each. Every company engaged in the business aforesaid, shall at all times have in their pipes and tanks an amount of merchantable oil equal to the aggregate of outstanding receipts, certificates, accepted orders, vouchers, acknowledgments, evidences of liability and credit balances, on the books thereof. (Acts 1891, c. 44.)

§ 2845. Penalties for unauthorized issuance of receipts, etc.

17. Any company, its officers or agents, who shall make or cause to be made, sign or cause to be signed, issue or cause to be issued, put in circulation or cause to be put in circulation, any receipt, accepted order, certificate, voucher or evidence of liability, or shall sell, transfer or alter the same, or cause such sale, transfer or alteration, contrary to the provisions of this Act, or shall do or cause to be done, any of the acts prohibited by the thirteenth section of this Act, or omit to do

any of the acts of said section directed, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of not exceeding one thousand dollars, and undergo imprisonment not less than ten days nor exceeding one year. (Acts 1891, c. 44.)

§ 2846. Penalties for unauthorized sales, incumbrances, etc.

18. Any company, its officers, or agents, who shall sell, encumber, transfer or remove, or cause or procure to be sold, transferred or removed from the tanks or pipes of such company, any petroleum crude or refined, without the written consent of the owner or owners thereof, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of one thousand dollars and undergo an imprisonment of not less than ninety days and not exceeding one year. (Acts 1891, c. 44.)

§ 2847. Penalties for failure to make reports.

19. Any company engaged in the business of transporting by pipe lines or storing petroleum, crude or refined, and each and every officer or agent of such company who shall neglect or refuse to make the report and statement required by the fifteenth section of this Act, within the time and the manner directed by said section, shall forfeit and pay the sum of one thousand dollars, and in addition thereto the sum of five hundred dollars for each day after the tenth day of the month that the report and statement required by said section fifteen shall remain unposted as therein directed. (Acts 1891, c. 44.)

§ 2848. Examination of companies.

20. The holder of any receipts, certificates, accepted orders, or other vouchers or evidences of liability, or the owners of oil in the custody of any such company described and referred to in this Act, to an amount not less in the aggregate than ten thousand barrels of petroleum, crude or refined, may at any time present their petition to the circuit court of any county wherein such company may be engaged in the business or have its principal office, or to any judge of said court in vacation, setting forth under oath, their ownership as afore-

said and desire for the appointment of examiners for the purposes of this section; and upon such petitioners giving bonds to be approved by the court or by the judge granting the order, that they will pay all expenses and costs that may accrue in the proceedings, the court, or any judge thereof, in vacation, shall forthwith appoint such number of impartial, disinterested and expert persons as may be asked for in said petition, as examiners, and shall fix the amount of their compensation; and the court or judge by order, shall direct and empower such examiners to immediately inspect and measure all the petroleum, crude or refined, in the custody of any such company named in the said petition, on the day of such inspection, and to examine the books of said company relating to the issue and cancellation of receipts, certificates, accepted orders, vouchers, or evidences of liability, and to its open accounts with persons, companies or corporations with whom it deals in the receipt and delivery of crude or refined petroleum. Such examiners when so appointed shall each immediately be sworn before any authorized officer to perform his duties with fidelity and according to law, which oath shall be reduced to writing, signed and filed with the clerk, and they shall then make immediate inspection, examination and measurement, as required by said petition and order and by this Act. And it shall be the duty of each and every such company, its officers, agents and employees, to give immediately upon request of any such authorized examiners, all the information demanded in said petition and required by this act to be reported, and also full access to the offices, tanks, pipes, books and accounts of such company. Upon the completion of such inspection, measurement and examination, it shall be the duty of the examiner or examiners, or in the event of death, resignation, declination or inability to act of any of them, then the others, or any of them within ten days after their appointment to make the court appointing them, a written, signed and sworn report of such examination, inspection and measurement, and file the same of record with the clerk thereof, which report shall show:

First.—How much merchantable and also how much unmerchantable petroleum, crude or refined, they found in the tanks and lines of such company, and where the same was located or held by description of tanks.

Second.—For the custody or delivery of how much crude or refined petroleum they found such company to be liable at the same date.

Third.—How much of such liability was represented by outstanding receipts, and how much by credit balances. (Acts 1891, c. 44.)

§ 2849. Offenses by examiners.

21. Any examiner so appointed as aforesaid, who shall make any false examination, inspection, measurement or report, or shall make known directly or indirectly to any person any information he may become possessed of in the course of his examination, inspection or measurement, except by means of his report made and filed in accordance with this Act, or who shall receive directly or indirectly any fee, reward or benefit, or the promise of any fee, reward or benefit, other than that provided by this Act, for the performance or non-performance of any duty or thing contemplated by this Act, or connected with his said employment, shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of one thousand dollars, and may at the discretion of the court, be confined in jail not to exceed one year. (Acts 1891, c. 44.)

§ 2850. Same.—Refusal to furnish information, etc.—Penalties.

22. Any officer, agent, manager, superintendent, or employee of any company engaged in the transportation by pipe lines of petroleum, crude or refined, or the storage thereof, who shall refuse or neglect after demand made to give to any authorized examiner full and free access to any and all offices, pipes, tanks, accounts, books and vouchers required by him in the pursuance of his appointment and this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of not exceeding one thousand dollars, and may at the discretion of court be confined in jail not to exceed one year. (Acts 1891, c. 44.)

§ 2851. Repeal.

23. All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed. (Acts 1891, c. 44.)

WYOMING.

WASTE OF OIL OR GAS.

§ 1. Oil or gas waste.
§ 2. Plugging abandoned wells.
§ 3. Sworn statement to be filed.
§ 4. Penalty.
§ 5. Adjoining owners may plug abandoned wells.
§ 6. Emergency.

TAXATION.

§ 7. Return for assessment.
§ 8. Sworn statement.
§ 9. Violation fixed by board.
§ 10. Repealing clause.
§ 11. Emergency.

AN ACT amending and re-enacting Chapter 228 of the Wyoming Complied Statutes of 1910, regulating the plugging of oil and gas wells, and providing a penalty for the violation of the same.

[Acts 1913, p. 37.]

Be it enacted by the Legislature of the State of Wyoming: Section 1, That Chapter 228, of the Wyoming Complied Statutes, 1910, be amended and re-enacted to read as follows:

§ 1. Oil and gas.—Waste.

Sec. 1. It shall be unlawful for any person or corporation having possession or control of natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle for a longer period than ten (10) days next after gas or oil shall have been struck in such well. And hereafter all such gas or oil shall be safely and securely confined in such well pipes or other safe and proper receptacles.

§ 2. Plugging abandoned wells.

Sec. 2. Whenever any well shall have been sunk for the purpose of obtaining natural gas or oil or exploring for the

same, and shall be abandoned or cease to be operated for utilizing the flow of gas or oil therefrom, it shall be the duty of any person or corporation having the custody or control of such well at the time of such abandonment or cessation of use, and also of the owner or owners of the land wherein such well is situated, to properly and securely stop and plug the same as follows: If such well has not been "shot" there shall be placed in the bottom of the hole thereof a plug of well seasoned pine wood, the diameter of which shall be within one-half inch as great as the hole of such well, to extend at least three feet above the salt water level, where salt water has been struck; where no salt water has been struck such plug shall extend at least three feet from the bottom of the well. In both cases such wooden plugs shall be thoroughly rammed down and tightened by the use of drilling tools. After such ramming and tightening the hole of such well shall be filled on top of such plug with finely broken stone or sand, which shall be placed and well rammed to a point at least four feet above the gas or oil bearing rock; on top of this stone or sand there shall be placed another wooden plug at least five feet long with diameter as aforesaid, which shall be thoroughly rammed and tightened. In case such well shall have been "shot" the bottom of the hole thereof shall be filled with a proper and sufficient mixture of sand stone and dry cement, so as to form a concrete up to a point at least eight feet above the top of the gas or oil bearing rock or rocks and on top of this filling shall be placed a wooden plug at least six feet long, with a diameter as aforesaid, which shall be properly rammed as aforesaid.

§ 3. Sworn statement to be filed.

Sec. 3. Whenever any person, persons or corporation having abandoned or ceased operating any well or wells, such person or corporation shall file with the County Clerk of the county in which such well or wells are located, a sworn statement setting out the manner in which such well or wells have been plugged and the time that same were plugged, and the location of said well or wells. Said statements shall be sworn to by at least two persons who shall have assisted in the actual work of so plugging said well or wells.

§ 4. Penalty.

Sec. 4. Any person violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor and be punishable by a fine of not more than five hundred dollars ($500.00) and not less than one hundred dollars ($100.00) in the discretion of the court, and all such fines when so collected shall be paid into the treasury of the county.

§ 5. Adjoining owners may plug abandoned wells.

Sec. 5. Whenever any person or corporation in possession or control of any well in which natural gas or oil has been found shall fail to comply with the provisions of this chapter, any person or corporation lawfully in possession of lands situated adjacent to or in the vicinity or neighborhood of such well may enter upon the lands which such well is situated and take possession of such well from which gas or oil is allowed to escape in violation of the provisions of section 1 hereof, and pack and tube such well and shut in and secure the flow of gas or oil, and maintain in a civil action in any court of competent jurisdiction in this State against the owner, agent or manager of said well, and each of them jointly and severally to recover the cost and expense of such tubing and packing, together with attorney's fees and costs of suit. This shall be in addition to the penalties provided for by section 4 hereof.

§ 6. Emergency.

Sec. 6. This Act shall take effect and be in force from and after its passage.

Approved February 21, 1913.

TAXATION OF MINES.

AN ACT to amend and re-enact sections 2449, 2459 and 2451 of Chapter 164, Wyoming Complied Statutes, 1910, and to provide for the taxation of the output of natural gas.

[Act 1917, p. 9.]

Be it enacted by the Legislature of the State of Wyoming:

Sec. 1. That section 2449 of the Wyoming Complied Statutes, 1910, be amended and re-enacted to read as follows:

§ 7. Return for assessment.

Sec. 2449. The gross product of all mines and mining claims from which gold, silver and other precious metals, soda, saline, coal, petroleum or other crude or mineral oil, or natural gas, or other valuable deposit is, or may hereafter be produced, while the same are being worked or operated, but not while the same are simply in the course of development, shall be returned by the owner, owners, lessee or operator thereof for assessment for taxation, assessed for taxation, and taxes in the manner provided for in this chapter, and such tax shall be in addition to any tax which may be assessed upon the surface improvements of such mines or mining claims, and in lieu of taxes upon the land of such claims while the same are being worked or operated.

Sec. 2. That section of the Wyoming Complied Statutes, 1910 be amended and re-enacted to read as follows:

§ 8. Sworn statement.

Sec. 2450. The owner, owners, lessee or operator of mines or mining claims from which gold, silver and other precious metal, soda, saline, coal, petroleum or other crude or mineral oil, or natural gas, or other valuable deposits is produced, but not while the same are simply in the course of development, shall, not later than the second Monday in January in each and every year, file with the state board of equalization a sworn assessment schedule statement setting forth the gross product in tons, gallons or thousands of cubic feet, as the case may be, of such mine or mineral claim during the calendar year expiring immediately preceding the first day of January of the then current year. If the return aforesaid be not received by the second Monday in January, as herein provided for [.] or if received and the state board of equalization shall believe that the return is not full, complete and correct, it shall be the duty of said board to proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same.

Sec. 3. That section 2451 of the Wyoming Complied Statutes, 1910, be amended and re-enacted to read as follows:

§ 9. Valuation fixed by board.

Sec. 2451. The state board of equalization shall at least ten days before the date fixed for making assessment, classify and

prescribe and fix the valuation, each year, for the assessment of the gross product, in tons, gallons or thousands of cubic feet, as the case may be, of all mines or mining claims from which gold, silver or other precious mineral, soda saline, coal petroleum or other crude or mineral oil, or natural gas, or other valuable deposits are produced.

§ 10. Repealing section.

Sec. 4. All Acts or parts of Acts in conflict or inconsistent with the provisions of this Act are hereby repealed.

§ 11. Emergency.

Sec. 5. This Act shall take effect and be in force from and after its passage.

Approved February 8, 1917.

STATE GEOLOGIST.

§ 1. Appointment.
§ 2. General duties.
§ 3. Fees.
§ 4. Reports.

§ 1. Appointment.

There shall be a State geologist of the State of Wyoming, who shall be appointed by the governor by and with the consent of the Senate. He shall hold his office for the term of six years or until his successor shall have been appointed and qualified.

§ 2. General duties.

It shall be the duty of the State geologist to make reports on mining property where a proper certificate has been presented showing sufficient development and upon the payment of fees hereinafter prescribed, and his reports shall be in such form as is usually required of mining exchanges, for the purpose of obtaining a working capital, provided that such property shall be deemed by the State geologist of sufficient value to warrant favorable report. It shall be the duty of the State geologist to collect official information relating to the various

mines and mining projects of the State and to publish and circulate such information as he may deem advisable for advertising the mineral wealth of the State and also to take any steps which would be likely to advance the development of the mining industry. It shall be the further duty of the State geologist to examine free of charge all specimens of rock or mineral formation, and to name and classify such specimens so far as it be in his power, without an assay, and to make returns to the person sending the same. He shall ex-officio perform the duties of inspector of mines until otherwise provided by law.

§ 3. Fees.

For the examination of and report on any mining prospect, undeveloped oil or coal land or other form of mineral deposit, as recognized under the United States mining laws, the State geologist shall charge a minimum fee of $25, with a further fee of $25 per day for any detailed examination and report on any mine, oil or coal land or other mineral deposit: *Provided,* That the State geologist shall find that said mine, oil or coal land or other mineral deposit shall be a producing mine, oil or coal land or other mineral deposit, or be in shape to produce ore, oil, coal or other minerals at a profit to the owner or lessees. The State geologist shall exercise a sound discretion in fixing the amount of fees for each examination, and his decision shall be final, said fees to be paid in advance by the person or persons requesting such examination. The State geologist shall state in full in the official record of each report, the reason for each charge, and shall pay over to the State treasurer on the first day of each month all funds that may come into his hands by reason of the duties of his office.

§ 4. Record reports.

It shall be the duty of the State geologist to keep a book with proper index, alphabetically arranged, in which he shall record all reports made by him, giving the name of the mine owner, the name of the mine, where situated, kind of mine, whether gold, silver, copper or other mineral.

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